CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 83

NORMAN W. BINGHAM, JR., ET AL., ETC.,
PETITIONERS

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MAY 29, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 83

NORMAN W. BINGHAM, JR., ET AL., ETC.,
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX.

	Page
Proceedings in U. S. C. C. A., First Circuit	1
Caption	1
Record from D. C. U. S., District of Massachusetts	1
Caption	1
Petition	2
Answer	6
Motion for leave to amend petition and order allowing same	6
Statement of agreed facts	7
Exhibit 1—Life Insurance Policy, Berkshire, No. 35098	11
2—Same, No. 41714	17
3—Same, No. 47954	23
4—Same, No. 47955	29
5—Same, Manhattan, No. 60061	37
6—Same, No. 60062	39
7—Same, Connecticut Mutual, No. 168175	43
A—Claim for Refund	49

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 6th, 1935

—7085-C

	Page
Record from D. C. U. S., District of Massachusetts—Continued	1
Recital as to hearing	59
Respondent's motion for judgment and order denying same	59
Petitioners' motion for judgment and order allowing same	59
Docket entries	60
Petitioners' motion for entry of judgment forthwith and order allowing same	60
Judgment	61
Opinion, Brewster, J.	61
Bill of exceptions	64
Caption	64
Respondent's motion for judgment	65
Petitioners' requests for rulings of law	65
Petitioners' motion for judgment	65
Order allowing bill of exceptions	66
Stipulation as to record	66
Defendant's Exhibit A—Application for Insurance, Berkshire	69
B—Same	71
C—Same	73
D—Same	75
E—Same, Manhattan	77
F—Same, Connecticut Mutual	79
Recital as to order allowing appeal	81
Assignments of error	81
Recital as to citation and service	82
Clerk's certificate	82
Memorandum re order enlarging time	82
Opinion, Wilson, J.	83
Opinion, Bingham, J., dissenting in part	88
Judgment	91
Recital as to order staying mandate	91
Clerk's certificate (omitted in printing)	
Order allowing certiorari	91

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1934.

No. 2983.

UNITED STATES OF AMERICA,

DEFENDANT, APPELLANT,

v.

NORMAN W. BINGHAM, JR., ET AL., EXECUTORS,

PETITIONERS, APPELLEES.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 4592, LAW DOCKET.

NORMAN W. BINGHAM, JR., ET AL.,
EXECUTORS OF THE WILL OF KING U. [illegible],

PETITIONERS,

v.

UNITED STATES OF AMERICA,

DEFENDANT.

The petition in this cause was filed in the clerk's office on the tenth day of January, A. D. 1931, and was duly entered at the December Term of this court, A. D. 1930, and is as follows:

PETITION OF NORMAN W. BINGHAM, JR., ET AL., EXECUTORS OF THE WILL OF KING UPTON.

[Filed January 10, 1931.]

The petitioners say:

FIRST: That they are the executors of the will of King Upton, late of Marblehead, in the District of Massachusetts.

SECOND: That on or about February 24, 1922, return for Federal Estate tax was filed by the said executors with the Office of Collector of Internal Revenue at Boston, said return being made up by said Executors in accordance with the provisions of the Revenue Act of 1918 and regulations pertaining thereto then in force; that the amount of Federal estate tax shown due by said return was $8415.43; and that said tax was paid at the time of filing the return, to the then Collector, Malcolm E. Nichols, who, as your petitioners are informed and believe and therefore say, in turn turned it over to the United States.

THIRD: That in compliance with the Regulations of the Commissioner of Internal Revenue there was included in said estate tax return the proceeds of all policies of insurance taken out by the decedent upon his own life, whether payable to his estate or to any other beneficiaries; that the proceeds of the policies amounted to $88,284.96 and that all of said policies at the time of the death of the decedent were payable to beneficiaries other than his estate or its representatives; that the tax paid on February 24, 1922, included a tax upon $48,284.96, to wit, the excess over $40,000. of the full amount of said policies.

FOURTH: Included among the said policies were the following:

(a) Four policies of the Berkshire Life Insurance Company for $5,000. each, issued one in 1891, one in 1893, and two in 1895, payable upon the death of the assured to his executors, administrators or assigns. These policies contained no reservation of the right to change the beneficiary. On July 25, 1904 the decedent assigned all his right, title and interest in

said policies to his wife, Annie D. Upton, provided she survived him, reserving and excepting only the right to the assured to apply the cash value of any dividends or additions thereon in payment of premiums thereafter due on said policy. This assignment was subject only to a prior assignment to the Berkshire Life Insurance Company as security for a loan. Said Annie D. Upton survived the decedent and received the net proceeds of these policies in excess of the loan, to wit: the sum of $14,334.49, as set forth in the return.

(b) Two policies for $5,000. each in the Manhattan Life Insurance Company, issued in 1888, one payable upon the death of the assured to George Upton and the other to Annie D. Upton. There was no reservation in either of these policies of any right in the assured to change the beneficiary. Said George Upton and Annie D. Upton survived the decedent and received the net proceeds of these policies, to wit; the sum of $5,000. each, as set forth in the return.

(c) A policy for $10,000. in the National Life Insurance Company, Montpelier, Vt., issued in 1892, payable upon the death of the assured to his legal representatives or assigns. The following endorsement was made on the policy:

> "Beneficiary changed July 28th, 1904, at request of the insured to his wife Annie D. Upton if living, at his decease, otherwise the executors, administrators or assigns of the insured, or to such other beneficiaries as may, from time to time, be designated by the insured by written request filed with the Company during his lifetime, such changes to take effect only when endorsed on the policy by the Company."

Said Annie D. Upton survived the decedent and received the net proceeds of the policy, to wit; the sum of $10,072.51 as set forth in the return.

(d) A policy for $10,000. in the Fidelity Mutual Life Insurance Company of Philadelphia, Penna., issued in 1908, payable upon the death of the assured to Annie D. Upton.

A right was reserved to the assured to change the beneficiary but was never exercised. Said Annie D. Upton survived the decedent and received the net proceeds of the policy, to wit: the sum of $10,000. as set forth in the return.

(e) A policy for $5,000. in the Connecticut Mutual Life Insurance Co. issued in 1883, payable upon the death of the assured to Annie D. Upton. There was no reservation to the insured of the right to change the beneficiary of this policy. Said Annie D. Upton survived the decedent and received the net proceeds of the policy, to wit: the sum of $5,035.37, as set forth in the return.

FIFTH: That the proceeds of the policies named in the subdivisions to the preceding paragraphs were erroneously included as part of the gross estate of the decedent, and the tax paid by the decedent, to the extent that it was based on the proceeds of said policies, to wit: to the extent of $1931.39, was without warrant in law and was illegal and void.

SIXTH: That thereafter on or about May 28, 1925, your petitioners duly filed with the Collector of Internal Revenue at Boston, Massachusetts, a claim for refund of said tax in the amount of $1931.39, and on August 10, 1925, filed with said Collector an amended claim for refund, both said claims for refund being based on the illegal imposition of a tax on said policies of insurance.

SEVENTH: That thereafter, on the 28th day of March, 1930, the Commissioner of Internal Revenue rejected said claims for refund in their entirety.

EIGHTH: That your petitioners are advised and therefore aver that the collection from them of the said sum of $1931.39 as a tax alleged to be due under Title IV of the Revenue Act of 1918 on the proceeds of the above mentioned insurance policies was illegal, erroneous and unlawful in that said policies of insurance were taken out, and were made payable to beneficiaries other than the decedent's estate, long prior to the passage of the Revenue Act of 1918, the policies referred to in subparagraphs (a) (b) (e) and, it is claimed,

(c) of Paragraph Fourth not being subject to change in beneficiary by the decedent, and the policies referred to in subparagraphs (c) and (d) not having had any change made by the decedent in the beneficiaries since 1908.

NINTH: That there is justly due and owing to them from the United States on account of the matters hereinbefore set forth, the sum of $1931.39 with interest at 6% thereon from February 24, 1922.

TENTH: That your petitioners have made no assignment or transfer of their said claim or any part thereof, and that there are no credits or offsets due from them to the United States, and that they have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government.

Wherefore, your petitioners pray judgment against the United States for $1931.39 with interest as stated.

NORMAN W. BINGHAM, JR.,
ANNIE D. UPTON AND
GEORGE UPTON,
Executors of the Will of King Upton.
By GEORGE S. FULLER,
Attorney of Record.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. January 10, 1931.

Then personally appeared the above-named George S. Fuller and made oath that the statements of fact contained in the foregoing petition are true to the best of his knowledge and belief, except those stated to have been made upon information and belief, and that as to those he believes them to be true.

Before me

(Seal) SEYMOUR P. EDGERTON,
Notary Public.

At the same term, to wit, January 21, 1931, the following answer was filed:

ANSWER.

[Filed January 21, 1931.]

Now comes the respondent in the above-entitled action and for its answer to the petition on file herein denies each and every material allegation, item, count and particular in said petition contained.

By its Attorneys,

FREDERICK H. TARR,
United States Attorney.

By: J. DUKE SMITH,
Special Assistant to the United States Attorney.

This cause was thence continued from term to term to the March Term, A. D. 1932, when, to wit, April 7, 1932, the following motion to amend petition was filed by the petitioners and allowed by the court:

MOTION TO AMEND PETITION.

[Filed and Allowed April 7, 1932.]

Now come the petitioners and move that they be allowed to amend their petition as follows—

1. By striking out subparagraphs (c) and (d) of paragraph Fourth of the petition.

2. That paragraph Sixth of the petition be amended so as to read as follows—

> "SIXTH: That thereafter on or about May 28th, 1925 your petitioners duly filed with the Collector of Internal Revenue at Boston, Massachusetts, a claim for refund of the Federal Estate Tax in the amount of $1931.39 and on August 10th, 1925 filed with said Collector an amended claim for refund thereof, both said claims for refund being based on the illegal imposition of a tax on said policies of insurance and certain other policies."

3. That the amount of the wrongful tax referred to in paragraphs Fifth, Eighth and Ninth and in the prayer of the petition be changed from $1931.39 to $1174.79.

By their attorneys,
BURNHAM, BINGHAM, GOULD & MURPHY.

Assented to:
FREDERICK H. TARR, *United States Attorney.*
By J. DUKE SMITH, *Special Assistant to the United States Attorney.*

April 7, 1932,
BREWSTER, J. Motion granted, amendment allowed.

Attest, JOHN E. GILMAN, JR.,
Deputy Clerk.

This cause was thence continued from term to term to the June Term, A. D. 1933, when, to wit, June 30, 1933, the following statement of agreed facts was filed:

STATEMENT OF AGREED FACTS.

[Filed June 30, 1933.]

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys, that the following facts shall be taken as true, provided however, that this stipulation shall be without prejudice to the right of either part to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. King Upton, late of Marblehead in the Commonwealth of Massachusetts, was born April 12, 1862, and died on February 27, 1921.

2. The petitioners are the executors of the will of said King Upton.

3. The Annie D. Upton, hereinafter referred to, wife of the said King Upton, survived her husband, and is now living.

4. The George Upton hereinafter referred to, son of the said King Upton, survived his father and is now living.

5. The petitioners on February 25, 1922, filed with the Collector of Internal Revenue at Boston, Massachusetts, a Federal estate tax return for the Estate of King Upton. On the same day the petitioners paid to Malcolm E. Nichols, the then Collector of Internal Revenue, who in turn turned it over to the United States, the amount of tax shown by said return to be due, to wit: $8,415.43.

6. At various times during his lifetime the said King Upton took out *seventeen* policies of life insurance upon his own life. The proceeds from these seventeen policies of life insurance amounted to $88,284.96. After deducting the specific exemption of $40,000.00, the executors included in the federal estate tax return filed for the Estate of King Upton, deceased, the balance of the proceeds from these seventeen policies of life insurance, the amount of which is $48,284.96. The proceeds from ten of these life insurance policies amounted to $58,950.14, and as to these policies it is conceded by the plaintiff that the amount of the proceeds from said policies was properly included as a part of the statutory gross estate of King Upton, deceased, for federal estate tax purpose in view of the provisions of Section 402(f) of the Revenue Act of 1918, and these ten policies are not involved in this action. The plaintiff, however, contends that the remaining seven policies were improperly included as a part of the statutory gross estate of the said King Upton, deceased. These seven insurance policies with their respective dates, policy numbers, names of companies and the amounts of the proceeds, are as follows:

Exhibit No.	Policy No.	Company.	Date of Policy.	Amount of proceeds from Policy.
1.	35098	Berkshire Life Ins. Co.	6/1/1891	$5,025.80
2.	41714	" " " "	10/11/1893	5,152.59
3.	47954	" " " "	12/24/1895	5,028.05
4.	47955	" " " "	12/24/1895	5,028.05
				$20,234.49

		Less: Loan secured by above policies		5,900.00
				$14,334.49
5.	60061	The Manhattan Life Ins. Co.	10/9/1888	5,000.00
6.	60062	The Manhattan Life Ins. Co.	10/9/1888	5,000.00
7.	168175	The Connecticut Mutual Life Ins. Co. of Hartford,	5/22/1883	5,035.37
		Total value of proceeds.....		$29,369.86

A photostatic copy of each of said policies, together with the applications and all riders attached to the policies and all indorsements thereon, is attached hereto and it is stipulated and agreed that said copies are true and complete copies and that they may be received and used in evidence for all purposes for which the original policies might be used.

7. The premiums on all of the policies of life insurance referred to in paragraph 6 hereof were paid by King Upton out of his individual funds, from the time of their issuance up to the time of his death.

8. On June 8, 1925, the plaintiffs filed with the Collector of Internal Revenue at Boston, Massachusetts, a claim for refund in the amount of $1,931.39, and on August 12, 1925, the plaintiffs filed an amended claim for refund, a copy of which is hereto attached and marked "Exhibit A" and by reference is hereby made a part hereof.

9. On March 28, 1930, the Commissioner of Internal Revenue rejected the claim and the amended claim in their entirety.

10. No other action has been had on said claim in Congress or in any of the departments; no other action on said claim is pending in any court; no one other than the petitioners are the owners thereof or interested therein, and no assignment or transfer of this claim or any part thereof or of any interest therein has been made. The petitioners at all times have

borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government.

BURNHAM, BINGHAM, PILLSBURY, DANA & GOULD,
GEORGE S. FULLER, *Counsel for Plaintiffs.*

FREDERICK H. TARR, *United States Attorney.*
By J. DUKE SMITH, *Special Assistant to the United States Attorney.*
Counsel for Defendant.

EXHIBIT 1.

No. 33096 Age 29

BERKSHIRE

LIFE INSURANCE COMPANY

Incorporated by the Legislature of Massachusetts 1851.

$ 111.50 = $ 5000

THIS POLICY OF INSURANCE

Witnesseth that the Berkshire Life Insurance Company

In Consideration of the Application for this Policy and of the statements and agreements made in or upon which this Policy is based, and that the Insured shall pay to this Company at its Home Office in Pittsfield, Mass., or to its duly authorized agent, the premium mentioned in this Policy, and in consideration of the payment of the premiums hereinafter specified, does insure the Life of Rosy Upton of Salem Mass.

in the amount of Five thousand Dollars, for the term of life, with premiums, less the unpaid balance of any of the yearly premiums for which notes or credit may have been given, and interest on such deferred premiums if unpaid, the said Company, on the following conditions and also upon those regulations, rights and conditions stated on the back of this Policy, which are hereby declared to be and make part hereof, promises to pay at the office of the said Company in Pittsfield, Mass., to his Executors, Administrators, Assigns, upon due notice and proof as required by this Policy of the death of the said Rosy Upton during the continuance and before the termination of this Policy.

1.—The annual Premium of One hundred and ten Dollars and fifty cents shall be paid in advance on delivery of this Policy, and thereafter to the Company at its Home Office in Pittsfield, Massachusetts, on or before the first day of June at noon in every year during the continuance of this contract, and unless said premiums are so paid this contract shall be void, and all payments previously made upon it shall be forfeited to the Company, except as provided by the Statutes of Massachusetts now in force.

In Witness Whereof, the said BERKSHIRE LIFE INSURANCE COMPANY has caused this Policy to be signed by its President and Secretary, at its office in Pittsfield, Mass., the 1st day of June A. D. One Thousand Eight Hundred and Ninety Six.

Jas. W. Stull Secretary. William R. Plunkett President.

Received Nov. 1896 Dec. 1896 Jas. W. Stull Agt.

CONDITIONS REFERRED TO IN THIS POLICY,

AND UPON WHICH IT IS ACCEPTED AND HELD

Power of Agents. THAT no Agent, or other person, except the President, Vice-President, Secretary, or Treasurer of the Company, has power to extend the time for paying a premium, to issue a permit for residence, travel or occupation, or to bind the Company by making any promise; that no representation or information can be received or have effect which is not contained in the application for this Policy.

Payment of Premiums. THAT all premiums are due and payable at the Home Office of the Company in Pittsfield, Massachusetts, but will be accepted elsewhere, when duly made in exchange for the Company's receipt, signed by the President or Secretary.

Notice of when due waived. THAT notice that each and every payment is due at the date named in the Policy is given and accepted by the delivery and acceptance of this Policy, and that any further notice, required by any statute, is hereby expressly waived.

Travel not Restricted. THAT the person whose life is insured by this Policy shall not, without the written assent of the Company, reside, travel, or visit outside the limits of the United States of America, the Dominion of Canada, Europe and the Bermuda Islands; but may make voyages upon the high seas in first-class vessels, by the usual routes, to and from ports within these limits.

Risks not assumed. THAT the insured shall not, without the consent of the Company in writing, engage in blasting, mining, submarine labor, aeronautic travel or excursions, the manufacture, handling or transportation of inflammable or explosive substances, service upon any railroad or any steamboat or other vessel, or in military or naval service of any kind in time of war.

Assignments. THAT the Company shall not be held to have notice of any assignment of this Policy until the original, or a duplicate thereof, is filed in the Company's Home Office; that the Company will not assume any responsibility for the validity of an assignment, and that before payment of the Policy the claim of an assignee shall be subject to proof of interest.

Suits. THAT no suit or proceeding shall be brought against the Company under this Policy after the expiration of two years from the time when the right of action first accrues.

Proofs of Death. THAT prompt notice of the death of the insured under this Policy shall be given to the Company, and formal proofs thereof, in accordance with the rules of the Company, shall be furnished within one year after the said death.

Dividends. THAT at the expiration of each period of five years, from the date of this Policy, it shall, if then in force, be credited with its share of the distributive surplus of the Company as determined and apportioned by its Board of Directors. Such share shall be applied by the Company in the purchase of additional insurance upon the person whose life is insured by this Policy, payable when the Policy becomes due. This additional insurance may be surrendered, and upon due acquittance being made, the cash value thereof will be paid, or it may be applied to the reduction of premiums. If the death of the insured should occur after a distribution of surplus to this Policy, and before the next period of five years has expired, a post mortem dividend will be paid with the Policy. No other distributions of surplus shall be made on account of this Policy.

FIVE YEAR ENDOWMENT POLICY

THE

BERKSHIRE LIFE INSURANCE CO.

OF PITTSFIELD, MASS.

No 3[illegible]

Received of the Berkshire Life Insurance Company of Pittsfield, Massachusetts [illegible] Dollars, as per memorandum below, in full payment and satisfaction of the Policy of Insurance No [illegible] issued by said Company on the life of [illegible], now deceased, and all dividends on the same, and [illegible] do hereby quit-claim and surrender said Policy to the said Company, and all rights and claims under the same, and declare the same to be fully paid, satisfied, discharged and cancelled, and guaranty that [illegible] have good title to said Policy and legal right to surrender the same.

Amount of Policy	$ 5,000. 00	Cash	$
Amount of Additions		Note	[illegible]
Post Mortem Dividend	[illegible]	Interest on Note [illegible] to [illegible]	
		Deferred Premium	
	$ 5,0[illegible]		$ [illegible]

[illegible]

In consideration of [illegible] Company [illegible] Dollars [illegible] Policy [illegible] and [illegible] executed and delivered [illegible]

Dated at Middlefield, Mass. this 17 day of March A. D. 1911.

Witness:

[illegible]

Receipt to be executed above exactly as indicated to

Annie D. Upton, Executrix of [illegible]

Amount [illegible]

Less [illegible]

— Annual Payment $110.50

[illegible]

THIS POLICY OF INSURANCE

Witnesseth that the Berkshire Life Insurance Company,

In Consideration of the Application on which this Policy is issued, and of the statements and agreements in said Application, all of which are hereby made a part of this Policy, and in further consideration of the payment of the Annual Premium of [illegible] Dollars and Cents, at the Home Office of this Company, to be evidenced by the receipt of the Company, and of the payment of the like sum, to be made at said office on or before the [illegible] day of [illegible] at noon, in every year, and also upon the conditions stated upon the back hereof, upon due notice and proof as required by this Policy, of the death of [illegible] of [illegible] promises to pay at the office of said Company in Pittsfield, Massachusetts, [illegible] Dollars to

his Executors, Administrators, or Assigns.

Upon the failure to pay, when due, any annual premium after the second, this Policy shall become paid-up in manner and for the amount now provided by the Statutes of the Commonwealth of Massachusetts; and it may be surrendered on any anniversary of its issue for its cash value as determined by said Statutes, upon the execution and delivery to the Company, at its Home Office in Pittsfield, Massachusetts, of a satisfactory release of all interests and claims to the avails thereof.

In Witness Whereof, the said BERKSHIRE LIFE INSURANCE COMPANY has caused this Policy to be signed by its President and Secretary, at its office in Pittsfield, Mass., the [illegible] day of [illegible] A. D. One Thousand Eight Hundred and Ninety [illegible].

[illegible] Secretary

[illegible] President

CONDITIONS REFERRED TO IN THIS POLICY,

AND UPON WHICH IT IS ACCEPTED AND HELD.

Powers of Agents. THAT no Agent or other person, except the President, Vice President, Secretary, or Treasurer of the Company, has power to extend the time for paying a premium, to issue a permit for residence, travel or occupation, or to bind the Company by making any promise, that no representation or information can be received or have effect which is not contained in the application for this Policy.

Payment of Premiums. THAT all premiums are due and payable at the Home Office of the Company in Pittsfield, Massachusetts, but will be accepted elsewhere, when duly made by exchange for the Company's [illegible], signed by the President or Secretary.

Notice of when due waived. THAT notice that each and every payment is due at the date named in the Policy is given and accepted by the delivery and acceptance of this Policy, and that any further notice, required by any statute, is hereby expressly waived. The payment and receipt of any premium less than a full annual premium shall not continue this Policy in force more than three months in case of a quarterly premium payment, or six months in case of a semi-annual payment.

Travel and Residence. THAT the person whose life is insured by this Policy shall not, within two years after the date of this Policy, without the written consent of the Company, reside, travel, or visit outside the limits of the United States of America, the Dominion of Canada, Europe and the Bermuda Islands, but may make voyages upon the high seas, by the usual routes and means of conveyance, to and from ports within said limits.

Exceptions. THAT the insured shall not, during the first two years of this Policy, without the consent of the Company in writing, engage in or be employed in blasting, mining, submarine labor, the manufacture, handling or transportation of inflammable or explosive substances, or service upon any railroad or any steamboat or other vessel, nor at any time in any military [illegible] or expedition, nor, without such consent in writing, in military or naval service of any kind in time of war.

Assignments. THAT the Company shall not be held to have notice of any assignment of this Policy until the original, or a duplicate thereof, is filed in the Company's Home Office; that the Company will not assume any responsibility for the validity of an assignment, nor that before payment of the Policy the claim of an assignee shall be subject to proof to the satisfaction of the Company.

Proofs of Death. THAT prompt notice of the death of the insured under this Policy shall be given to the Company, and formal proofs thereof, in accordance with the rules of the Company, shall be furnished within one year after the said death. No action shall be brought against the Company under this Policy after the expiration of two years from the time when the right of action first accrues.

Indebtedness. THAT the amount for more if any, of the year's premium and all premiums for which notes or credit may have been given, or interest on [illegible] notes, shall be a lien upon this Policy, and shall be deducted from the amount at any time due and to be paid on account of this Policy.

Insurable Interest. THAT at the expiration of each period of five years, from the date of this Policy, it shall, if then in force and if the premiums due on it have been paid as above, be credited with its share of the distributive surplus of the Company as ascertained and apportioned by its Board of Directors. Such share shall be applied by the Company in the purchase of a paid-up insurance upon the person whose life is insured by this Policy, payable when the Policy becomes due. This paid-up insurance may be surrendered, and the cash value thereof paid, or it may be applied to the reduction of premiums. If the death of the insured shall occur after a full [illegible] of surplus to this Policy, and before the next period of five years has expired, a portion of such dividend will be paid with the Policy.

Under the terms of the Massachusetts Insurance Act of 1887, this Policy will have paid-up and cash-surrender values at the end of each policy year as stated below, provided all the annual premiums due have been paid in cash to that time. Any [illegible] given will diminish these values, and any dividend additions outstanding will increase them.

TABLE OF PAID-UP AND CASH-SURRENDER VALUES.

YEAR	PAID-UP INSURANCE	CASH	YEAR	PAID-UP INSURANCE	CASH
[illegible]	$ [illegible]	1700	20th	$ 20105	9044.5
[illegible]	$ [illegible]	6810	21st	$ 21314	9915.5
3rd	$ [illegible]	12075	22nd	$ 22514	10599.0
4th	$ [illegible]	17544	23rd	$ 23665	11394.5
5th	$ 6 [illegible]	23170	24th	$ 24764	12207.5
6th	$ 716	29995	25th	$ 2979	16411.00
7th	$ [illegible]	35065	30th	$ 3405	20124.5
8th	$ 10124	41220	35th	$ 3750	25259.5
9th	$ 13224	47644.5	40th	$ 4044	29518.5
10th	$ 15760	54390	45th	$ 4275	33444.0
11th	$ 17476	61144.5	50th	$ 44456	36970.9
12th	$ 16304	66215	55th	$	$
13th	$ 17614	75460	60th	$	$
14th	$ 10194	82400			
15th					

NOTE. The values at the end of any year other than the above will be given upon application at the Company.

OPTIONAL POLICY

The
Berkshire
Life Insurance Co.
Pittsfield, Mass.

No. 41714

Received of the Berkshire Life Insurance Company of Pittsfield, Massachusetts, Five thousand fifty-two and 59/100 ---------- Dollars, as by memorandum below, in full payment and satisfaction of the Policy of Insurance No. 41714 issued by said Company on the life of [illegible], now deceased, and all dividends on the same; and I do hereby quit-claim and surrender said Policy to the said Company, and all rights and claims under the same, and declare the same to be fully paid, satisfied, discharged and cancelled, and guaranty that I have good title to said Policy and legal right to surrender the same.

Amount of Policy	$ 5,000.00	Cash	$ 4,870.59
Amount of Additions	---------	Note [illegible] 1919	47[illegible]
Post Mortem Dividend	60.40	Interest on Note 191 to 191	---------
[illegible]	110.19	Deferred Premium	---------
	$ 5,171.59		$ 5,171.59

It is hereby requested that the amount above stated be paid as follows.

In consideration of this payment, I hereby agree to indemnify and keep harmless from all cost and liability in respect of any and all estate taxes or duties thereof.

Dated at Pittsfield, Mass. this 12 day of March A. D. 1921

Witness

Receipt to be executed above exactly as indicated by

Annie J. Upton, assignee - wife of the Insured.

EXHIBIT 3.

BERKSHIRE LIFE INSURANCE COMPANY

Incorporated by the Legislature of Massachusetts, 1851.

THIS POLICY OF INSURANCE

Witnesseth that the Berkshire Life Insurance Company,

In Consideration of the Application on which this Policy is issued, and the statements and agreements in said Application, all of which are made a part of this Policy, and in further consideration of the payment of the Annual Premium of One hundred twenty eight Dollars and fifty Cents, at the Home Office of this Company, to be evidenced by the receipt of the Treasurer, or by the payment of the like sum, to be made at said office on or before the twenty fourth day of December at noon, in every year, and also upon the conditions stated upon the back hereof, upon due proof and notice as required by this Policy, of the death of Mary Upton of Salem Mass. promises to pay at the office of said Company in Pittsfield, Massachusetts Ten thousand Dollars to

his Executors, Administrators, or Assigns.

Upon the failure to pay, when due, any annual premium after the second, this Policy shall become paid-up in manner provided for the amount now provided by the Statutes of the Commonwealth of Massachusetts; and it may be surrendered on any anniversary of its issue for its cash value as determined by said Statutes, upon the execution and delivery to the Company, at its Home Office in Pittsfield, Massachusetts, of a satisfactory release of all interests and claims to the avails thereof.

In Witness Whereof, the said BERKSHIRE LIFE INSURANCE COMPANY has caused this Policy to be signed by its President and Secretary, at its office in Pittsfield, Mass., the 29th day of December A. D. One Thousand Eight Hundred and Ninety four

December 27 1894 Mary Ostbridge Salem Mass.

CONDITIONS REFERRED TO IN THIS POLICY,

AND UPON WHICH IT IS ACCEPTED AND HELD.

Agents. THAT none of the agents named for the President, Vice-President, Secretary, or Treasurer of the Company, has power to [illegible] or to [illegible] a contract for insurance, travel or exemption, or to bind the Company by making any promise, or by receiving notice of, permission or waiver of any of the conditions of the Policy, shall be binding upon the Company unless such agent is specially and [illegible] by one of the officers named, that such representation or information can be received or waiver or such notice received by the application for this Policy.

Payment of Premiums. THAT all premiums are to be paid at the Home Office of the Company in Pittsfield, Massachusetts, but will be accepted elsewhere, when duly made payable to the Company's receipt, signed by the President or Secretary.

Notice of other insurance. THAT notice that any premium or [illegible] is due at the date named in the Policy is given and accepted by the delivery and acceptance of [illegible] further notice, or precisely any custom is hereby expressly waived. The payment and receipt of any premium [illegible] a full annual premium shall not continue this Policy in force more than three months in case of a [illegible] unless [illegible] months in case of a semi-annual payment.

Travel. THAT the insured [illegible] insured by the Policy shall not, within two years after the date of this Policy, without the written consent of the Company, reside, travel, or visit outside the limits of the United States of America, the Dominion of Canada, Europe and the Bermuda Islands; but may make voyages upon the high seas by the usual routes and means of conveyance, to and from ports within those limits.

Exceptions. THAT the insured shall not, within [illegible] and two years of this Policy, without the consent of the Company in writing, engage, as an occupation, in electric, mining, submarine labor, the manufacture, handling or transportation of inflammable or explosive substances or fireworks upon any railroad or any steamboat or other vessel, nor at any time in any hostile travel or adventure, [illegible] consent such consent in writing, in military or naval service of any kind in time of war.

Assignment. THAT the Company shall not be bound by any assignment of this Policy until the original, or a duplicate thereof, is filed in the Company's Home Office, that the Company will not assume any responsibility for the validity of an assignment, and that before payment of the Policy the amount of an assignee shall be subject to proof to the satisfaction of the Company.

Proofs of Death. THAT proofs of the death of the insured under this Policy shall be given to the Company, and formal proofs thereof, in accordance with the rules of the Company, shall be furnished within one year after the said death. No action shall be brought against the Company under this Policy after the expiration of two years from the time when the right of action first accrues.

Indebtedness. THAT the unpaid balance of any of the year's premium and all premiums for which notes or credit may have been given, and interest on all or any obligations remaining unpaid shall be a lien upon this Policy, and shall be deducted from the amount at any time due and to be paid on account of the Policy.

Dividends. THAT at the expiration of each period of five years from the date of this Policy, it shall, if then in force and if the premiums have been fully paid, participate to the extent therein provided with its share of the distributable surplus of the Company as determined and apportioned by its Board of Directors. Such share shall be applied by the Company in the purchase of paid-up insurance upon the person whose life is insured by this Policy, payable when the Policy becomes due. This paid-up insurance may be surrendered for its cash value. If the death of the insured should occur after a distribution of surplus to this Policy, and before the next period of five years has expired, a post-mortem dividend will be paid with the Policy.

Under the terms of the Massachusetts Insurance Act of 1887, this Policy will have paid-up and cash-surrender values at the end of each policy year as stated below, provided all the annual premiums due have been paid in cash to that time. Any credit given will diminish these values, and any dividend additions outstanding will increase them.

TABLE OF PAID-UP AND CASH-SURRENDER VALUES.

YEAR	PAID-UP INSURANCE	CASH	YEAR	PAID-UP INSURANCE	CASH
2d	$ [illegible]	$ 2605	10th	$ [illegible]	$ 10220
3d	$ [illegible]	$ 5205	11th	$ [illegible]	$ 10375
4th	$ [illegible]	$ 10410	12th	$ 23561	$ 11900 45
5th	$ [illegible]	$ 20605	13th	$ 24770	$ 12744 30
6th	$ [illegible]	$ 27015	20th	$ 25500	$ 13617 30
7th	$ [illegible]	$ 33620	25th	$ 30000	$ 19000 00
8th	$ [illegible]	$ 40405	30th	$ 34199	$ 23675 50
9th	$ [illegible]	$ 47560	35th	$ 38410	$ 27855 55
10th	$ [illegible]	$ 54045	40th	$ 41114	$ 31356 60
11th	$ [illegible]	$ 60315	45th	$ 42333	$ 35166 62
12th	$ [illegible]	$ 69965	50th	$ 42819	$ 35577 60
13th	$ [illegible]	$ 77765	55th	$	$
14th	$ [illegible]	$ 85710	60th	$	$
15th	$ [illegible]	$ [illegible]			

OPTIONAL POLICY

No. 11,[illegible]

The

Berkshire

Life Insurance Co.

Pittsfield, Mass.

INSURANCE ON THE LIFE OF

Mary Upton

AMOUNT.

$3000.

DATE OF POLICY.

December 28 1903

ANNUAL PAYMENT, $23.30

MAR 1[illegible] 21

1 of 7

EXHIBIT 4.

Nov 4 1893 — Age 31

BERKSHIRE
LIFE INSURANCE COMPANY

$198.20 PREMIUM — $3,000.00 AMOUNT

THIS POLICY OF INSURANCE

Witnesseth that the Berkshire Life Insurance Company,

In Consideration of the Application on which this Policy is issued, and of the statements and agreements in said Application, all of which are hereby made a part of this Policy, and in further consideration of the payment of the Annual Premium of — One hundred & ninety eight — Dollars and — 20 — Cents, at the Home Office of this Company, to be evidenced by the receipt of the Company, and of the payment of the like sum, to be made at said office on or before the twenty fourth — day of — December — at noon, in every year, and also upon the conditions stated upon the back hereof, upon due notice and proof as required by this Policy, of the death of — — — — Benj H Olin — — — — of — Pittsfield Mass — promises to pay at the office of said Company in Pittsfield, Massachusetts, — Three thousand — Dollars to — — — —

CONDITIONS REFERRED TO IN THIS POLICY,

AND UPON WHICH IT IS ACCEPTED AND HELD.

Agent's Agency. "THAT no Agent or other person except the President, Vice-President, Secretary, or Treasurer of the Company, has power to extend the time of paying a premium, to issue a permit for residence, travel or occupation, or to bind the Company by making any promise or representation, or by granting waiver of any of the conditions of the Policy, unless upon the Company's own printed form in writing and signed by one of the officers named; that no representation or information can be received or made which is not contained in the application for the Policy.

Payment of Premiums. "THAT all premiums are due and payable at the Home Office of the Company in Pittsfield, Massachusetts, but will be accepted elsewhere, when duly made in exchange for the Company's receipt, signed by the President or Secretary.

Notice of which days waived. "THAT notice that each and every payment is due at the date named in the Policy is given and accepted by the delivery and acceptance of this Policy, and that no further notice, required by any statute, is hereby expressly waived. The payment and receipt of any premium other than a full annual premium shall not continue this Policy in force more than three months or such further period as may be specified in case of a semi-annual payment.

Travel and Residence. "THAT the person whose life is insured by this Policy shall not, within two years after the date of this Policy, without the written consent of the Company, reside, travel, or visit outside the Dominion of Canada, Europe and the Mediterranean, but may make voyages upon the high seas, by the usual routes and means of conveyance, to and from ports within these limits.

Engaging Aboard. "THAT the insured shall not, during the first two years of this Policy, without the consent of the Company in writing, engage as a sailor, except in ordinary coasting navigation, in blasting, mining, or quarrying, or in any similar occupation, or in any manufacture of explosive substances, or serve upon any vessel of any steamboat or other vessel, nor at any time in any war, riot or insurrection, without such consent in writing, in military or naval service of any kind in time of war.

Assignment. "THAT the Company shall not be held to have notice of any assignment of this Policy unless the original, or a duplicate thereof, is left with the Company's Home Office, nor the Company will not assume any responsibility for the validity of an assignment, and that before payment of the Policy the validity of any assignment shall be subject to proof to the satisfaction of the Company.

Proofs of Death. "THAT prompt notice of the death of the insured under this Policy shall be given to the Company, and formal proofs thereof, in accordance with the rules of the Company, shall be furnished within one year after the said death. No action shall be brought against the Company under this Policy after the expiration of two years from the time when the right of action first accrues.

Indebtedness. "THAT the amount value at any of the year's premium and all premiums for which notes or credit may have been given, and interest or other obligations remaining unpaid, shall be a lien upon this Policy, and shall be deducted from the amount at any time due and to be paid on account of this Policy.

Dividends. "THAT at the expiration of each period of five years from the date of this Policy it shall participate and if the premiums have been fully paid up to the [illegible] period, receive its share of the distributable surplus of the Company as determined and apportioned by its Board of Directors. Such share shall be applied by the Company in the purchase of a paid-up insurance upon the person whose life is insured by this Policy, payable when the Policy becomes due. The paid-up insurance may be surrendered for its cash value. If the death of the insured should occur after a distribution of surplus to this Policy, and before the next period of five years has expired, a post-mortem dividend will be paid with the Policy.

Under the terms of the Massachusetts Insurance Act of 1887, this Policy will have paid-up and cash-surrender values at the end of each policy year as stated below, provided all the annual premiums due have been paid in cash to that time. Any credit given will diminish these values, and any dividend additions outstanding will increase them.

TABLE OF PAID-UP AND CASH-SURRENDER VALUES.

YEAR	PAID-UP INSURANCE	CASH	YEAR	PAID-UP INSURANCE	CASH
1st	$ [illegible]	2605	16th	$ 3117	103090
2d	$ [illegible]	6405	17th	$ 3230	0103375
3d	$ [illegible]	10410	18th	$ 3356	1108 45
4th	$ [illegible]	14605	19th	$ 3490	137430
5th	$ [illegible]	27015	20th	$ 3580	136120
6th	$ [illegible]	33540	21st	$ 3660	100000
7th	$ 10[illegible]	40405	30th	$ 3499	226750
8th	$ 11640	47560	35th	$ 3240	271555
9th	$ 12810	54845	40th	$ 1114	313560
10th	$ [illegible]	62315	45th	$ 1333	351662
15th	$ 15794	69965	50th	$ 1509	385700
20th	$ 17731	77765	55th	$	
25th	$ [illegible]	85710	60th	$	
30th	$ [illegible]	93795			

NOTE.—The values at the end of any year other than the above will be given upon application to the Company.

OPTIONAL POLICY

The

Berkshire

Life Insurance Co.

Pittsfield, Mass.

No 47272

Received of the Berkshire Life Insurance Company of Pittsfield, Massachusetts, Five thousand two hundred [illegible] Dollars, as by memorandum below, in full payment and satisfaction of the Policy of Insurance No 47272 issued by said Company on the life of [illegible], now deceased, and all dividends on the same, and I do hereby quit-claim and surrender said Policy to the said Company, and all rights and claims under the same, and declare the same to be fully paid, satisfied, discharged and cancelled, and guaranty that I have good title to said Policy and legal right to surrender the same.

Amount of Policy	$ 5,000.00	Cash	$ 5,200.00
Amount of Additions	---------	Note	---------
Post Mortem Dividend	209.05	Interest on Note ---- 191 to ---- 191	---------
		Deferred Premium	---------
	$ 5,209.05		$ 5,200.00

It is hereby requested that the amount as above stated be paid on delivery.

* In consideration of this request, I hereby & [illegible] Company harmless from all cost and liability by reason of [illegible] taxes on account hereof.

Dated at Pittsfield, Mass., this 12 day of April A. D. 1911.

Witness [illegible] [illegible]

Receipt to be executed above exactly as indicated by

Annie D. Upton, Assignee - wife of the insured.

The original and duplicate Assignment should be sent to the Home office of the Company, where date of receipt will be endorsed and receipt made. The original will be retained on file and the duplicate returned.

Assignment. Ed 1902. Form E. 1M.

Policies 35 098 111 7111 112 7454 112 7455 (ORIGINAL)

In consideration of four & fifty dollars

do hereby assign all right, title and interest in Policy number 35 098 111 7111 112 7454 112 7455 issued by the

NEW YORK AND BOSTON

Berkshire Life Insurance Company of Pittsfield, Mass.

insuring the life of King Upton

of Boston, Mass and all additions to said policy, whether now or hereafter apportioned, (reserving and excepting the right to the assured to apply the cash value of any dividends or additions thereon in payment of premiums hereafter due on said policy) unto the said assignee, his executors, administrators and assigns, subject to the conditions and agreements in the Policy and to the By-laws of the Company. Dated June 30, 1902.

Dated at Boston, Mass. this 30th day of July

A. D. 19 02.

In presence of

Thos. Cowell

Elizabeth Toll

(Refer to Exhibits 1, 2, 3, + 4.)

Sum Insured. $ 5000.- No. (——— Annual Premium. $ 81.95

EXHIBIT 5.

The Manhattan Life Insurance Company

OF NEW YORK

In Consideration of the Application for this Policy, and the statements and covenants therein contained, which are a part of this contract, and of the ——— annual premium of Eighty one ——— 95 Dollars, to be paid in advance to the Company at its office in the City of New York, on the delivery of this Policy, and thereafter on the tenth ——— day of October ——— in every year, during the term of this Policy, **Insures** the life of King Upton ——— of Salem ——— in the County of Essex ——— and State of Massachusetts and will pay at its said office in the City of New York to his son George Upton ——— ——— his executors, administrators or assigns, first deducting therefrom any indebtedness on account of this Policy, ——— Five Thousand ——— Dollars ——— upon satisfactory proof at its said office of the death of the insured during the continuance of this Policy upon the following conditions:

I.—If any statement made in the application be in any respect untrue, or if any premium or interest on any note given on account of a premium be not paid when due, or if the insured die in consequence of any violation of law, or if he engage in any naval or military service except in the militia not in actual service, this Policy shall be void and all payments made upon it shall be forfeited to the Company: except, after being in force three full years, this Policy shall be incontestable for any misstatement in the application except as to age and if it shall lapse or become forfeited for the non-payment of any premium or interest on any note given on account of a premium the Company will, upon the surrender of this Policy within six months after such lapse, issue a non-participating paid up Policy for such sum as the legal net reserve on this Policy, at the time of lapsing, will purchase as a single premium at the Company's present published rates.

II.—Proof of death shall be furnished to the Company within two years after death, and shall contain full answers under oath to the questions in the Company's blanks, and no suit shall be brought against the Company on this Policy after two years from the time when the cause of action accrues.

III.—No provision of this contract can be changed or waived except by a written agreement, signed by the President or Secretary of the Company.

This Policy shall not participate in profits.

In Witness Whereof, The Manhattan Life Insurance Company has hereunto affixed its Corporate Seal, and by its President and Secretary signed and delivered this contract at the City of New York, this tenth ——— day of October ——— one thousand eight hundred and eighty eight ———

PAID

President.

Secretary.

A. [illegible]

Sum Insured $ 5000 — Annual Premium $ 87.1 —

The Manhattan Life Insurance Company

OF NEW YORK

In Consideration of the Application for this Policy, and the statements and covenants therein contained, which are a part of this contract, and of the annual premium of Eighty One ——— Dollars, to be paid in advance to the Company at its office in the City of New York, on the delivery of this Policy, and thereafter on the first day of October on every year, during the term of this Policy,

Insures the life of King Hyde of Ga. in the County of Lowndes and State of Georgia and will pay at its said office in the City of New York to Mrs. Mary Hyde Lowndes executors, administrators or assigns, first deducting therefrom any indebtedness on account of this Policy, Five Thousand ——— Dollars upon satisfactory proof at its said office of the death of the insured during the continuance of this Policy upon the following conditions:

I. If any statement made in the application be in any respect untrue, or if any premium or interest on any note given on account of a premium is not paid when due, or if the insured die in consequence of any violation of law, or if he engage in any naval or military service except in the militia not in actual service, this Policy shall be void and all payments made upon it shall be forfeited to the Company: except, after being in force three full years, this Policy shall be incontestable for any misstatement in the application except as to age and if it shall lapse or become forfeited for the non-payment of any premium or interest on any note given on account of a premium the Company will, upon the surrender of this Policy within six months after such lapse, issue a non-participating paid up Policy for such sum as the legal net reserve on this Policy, at the time of lapsing, will purchase as a single premium at the Company's present published rates.

II. Proof of death shall be furnished to the Company within two years after death, and shall contain full answers under oath to the questions in the Company's blanks, and no suit shall be brought against the Company on this Policy after two years from the time when the cause of action accrues.

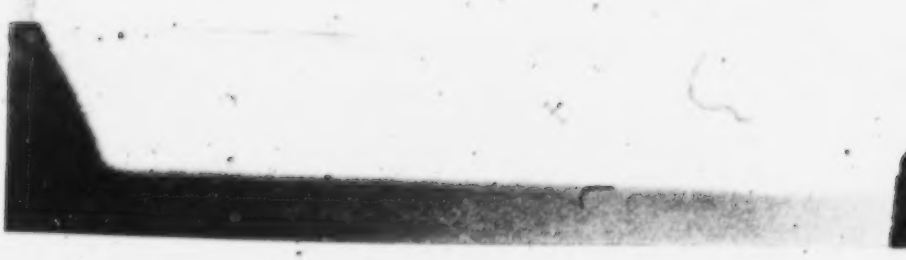
III. No provision of this contract can be changed or waived except by a written agreement, signed by the President or Secretary of the Company.

In Witness Whereof, The Manhattan Life Insurance Company has hereunto affixed its Corporate Seal, and by its President and Secretary signed and delivered this contract at the City of New York, this ——— day of October one thousand eight hundred and eighty one

PAID

President.

Secretary.



The blank spaces below are to be filled up only at the Home Office.

No. 60,061
60,061

APPLICATION OF

King Wilson

TO

The Manhattan Life Insurance Company

OF NEW YORK.

Date Oct 13 1847.

Albany: J. ..., Printer, 1847.

EXHIBIT "7"

The Connecticut Mutual Life Insurance Company of Hartford, Conn.

In Consideration of the application for this insurance, which is a part of this Contract, and a copy whereof is hereunto annexed, and of the several answers therein contained, and that the applicant doth warrant the same to be in all respects true, and of the annual premium of Two Hundred Thirty-seven ——— 00/100 Dollars to be paid to them on or before the Twenty-second day of May — in every year for the term of ten years from A D one thousand eight hundred and eighty-three ——— to one thousand eight hundred and ninety-two ——— inclusive,

Do Hereby Insure the Life of

King Upton

the Insured, of — Salem ——— County of — Essex ———

State of — Massachusetts ——— for the term of his natural life,

In the Sum of ——— Five Thousand ——— **Dollars,**

the said sum insured to be paid at the office of said Company, in Hartford, Conn.,

to — Annie Upton ——— (the Assured,) wife of the said Insured, for her sole use and benefit, or to her legal representatives, thirty days after due notice and satisfactory evidence of the death of the said Insured while this Contract is in full force and effect shall have been received at said office in Hartford, Conn., and upon surrender and satisfactory release hereof; or if the said Assured die before said Insured, the said sum insured shall be payable as above to his children, or to their guardian, if under age; or, if there be no such children or descendants of such children then living, the said sum insured shall be payable to the legal representatives of the said Insured; any balance of the year's premium when not all paid at the beginning of the year, and any other indebtedness to this Company on account of this Policy being first deducted therefrom; **2nd**, if, after the payment of two or more annual premiums as above, any subsequent premium or instalment of premium be not paid when due, said Company do thereupon and thereafter and upon the same considerations hereinbefore set forth, but without further payment of premiums, insure said life for said term but only in a sum to be ascertained by the Table of Paid-up Insurance endorsed hereon and hereby made a part of this Contract, such sum to be payable at the time and place and in the manner and to the persons above named; and it is agreed by all the parties hereto that this provision is and shall be in substitution for and in waiver of their several rights under any law of any State relating to the lapse or forfeiture of policies of life insurance; **3rd** at the end of ten years from the date hereof, or at the end of each period of five years thereafter, this Policy having been in force during such entire periods for the full sum first above named as insured hereby and not otherwise, this Company will pay a Cash Value therefor, to be ascertained by the Table of Cash Values endorsed hereon and hereby made a part of this Contract; such Cash Value to be payable at its said office upon surrender hereof within thirty days after the end of each such period, to and this Policy to be first released and discharged to the satisfaction of said Company by — King Upton, the Assured ——— ; and it is hereby agreed by all the parties hereto that such surrender, release, and discharge shall terminate this Policy, and any and every obligation whatsoever of said Company thereunder, to any and every person whatsoever:

Subject to the Conditions and Agreements upon the second page of this Policy, which are hereby referred to and made a part of this Contract.

In Witness Whereof, the said The Connecticut Mutual Life Insurance Company have, by their President and Secretary, signed and delivered this Contract, in the City of Hartford, State of Connecticut, Twenty-second day of — May — A. D. one thousand eight hundred and eighty-three ———

W G Morgan Secretary ——— Eaton Chapman ——— Vice President.

THIS POLICY

is issued upon the [illegible] upon Conditions and Agreements, referred to on the first page, and made a part of the Contract.

1st. That the contract between the Company and the Insured is wholly expressed and contained in this Policy, and the Application therefor, which Application is hereby made a part hereof, and that the several answers contained in said Application are warranted by the Insured thereby to be true in all respects, and further that no statement or declaration made by any Agent, Solicitor or Broker of the Company, or by the Insured in said Application, shall be taken or considered to be binding upon or bind the Company in the event of a claim hereunder, unless the same shall be reduced to writing and signed by the Insured, and the said Application, a copy of which is hereto annexed, shall be taken and held to be and to contain the only answers, or statements or representations made to this Company on behalf of the Insured; and that if this Policy has been obtained by or through any fraud, misrepresentation or concealment, then the same shall be absolutely null and void.

PAYMENT OF PREMIUMS.

2nd. That this Policy shall not be in force and binding on the Company unless the annual Premium herein shall have been actually paid during the lifetime of the Insured, and that if any subsequent Premium, or instalment of Premium, on this Policy be not paid when due, then this Policy shall cease and determine, and be null and void, except as to the surrender provided upon the payment of two or more annual premiums, and that no Premium or Premiums shall be considered as paid unless a receipt shall be given therefor, signed by the President or Secretary of the Company, and such receipt countersigned by the Agent of the Company at the place where such Premium is payable, if payable to an Agent of this Policy; and that all premiums or other payments on account of this Policy are payable at the office of the Company in Hartford, Conn., and not elsewhere; but for the convenience of the person paying the same, such payment may be made to any agent or corresponding agent of the Company for collection, and payment to such agent or correspondent shall be held to have been made at such office of the Company.

RISKS NOT INSURED AGAINST UNDER THIS CONTRACT.

3rd. The following risks are not assumed by this Company under this contract:

Duelling or fighting

Death while personally engaged or employed in making any aeronautic voyage or excursion, or in blasting, mining, or in any submarine operations, or in the manufacture, handling, use, custody, or transportation of highly inflammable or explosive substances or upon railroads or upon any steam, sea vessel, canal, river, lake, or railroad, or in any military or naval service whatsoever, whether voluntarily or otherwise (the militia when not in actual service always excepted), or as a member of any paid fire department, or from any accident or injury received while so engaged, without the consent of this Company previously given in writing.

Suicide, sane or insane

Death as a consequence of duelling, or in the violation of law or consequent thereon, or as a consequence of felony.

Suicide not included as risk

The self-destruction of the Insured, whether voluntary or involuntary, and whether he be sane or insane at the time thereof.

Intemperance not insured against

Death in a state of delirium, or from any disease in any degree produced by or resulting from the occasional or habitual use of alcoholic or narcotic stimulants, or from any accident or violence received while in a state of intoxication, or which there would have been defective memory, or any injury to or impairment of the health from such use.

In each and every of the foregoing cases this Policy shall become and be null and void.

FORFEITURE OF PREMIUMS.

4th. **That in every case in which this Policy shall cease and determine or shall become and be null and void, all premiums paid and moneys or credits held on account of the same shall be forfeited to this Company, except as hereinbefore provided.**

RETURN OF THE RESERVE IN CASE OF BREACH OF CERTAIN CONDITIONS.

5th. In case this Policy shall become and be null and void by reason of any matter or thing set forth in the first of these conditions, or by reason of the doing, happening, or being of any such condition or thing not hereby insured against as provided in the third of these conditions, the Company will, upon surrender and satisfactory release thereof within one year after the same shall have been ascertained to be or to have become null and void and not afterward, return to the assured the then net reserve upon this Policy according to the American Table of Mortality, assuming three per centum compound interest.

ASSIGNMENT AND SURRENDER.

6th. That no assignment of this Policy shall be valid, but the Company shall have power at any time, but at its own discretion, to accept a surrender and discharge of the same by the assured and the person nominated therein as payee of the Cash Value at stipulated periods.

AUTHORITY OF AGENTS.

7th. That Agents of the Company have no power or authority to make, alter, change, or modify any of the terms, conditions, or agreements of this Policy, or to waive forfeitures thereof, and that no alterations, change, modifications, waiver, or subsequent agreement whatever respecting this Policy shall be binding on said Company unless made in writing signed by the executive officers thereof.

PLACE OF CONTRACT.

8th. It is agreed that this Policy is issued and delivered at Hartford, in the State of Connecticut, and is to be in all respects construed and determined in accordance with the laws of that State.

United States of America

TREASURY DEPARTMENT

WASHINGTON

February 12, 19 31.

PURSUANT to the provisions of Section 661, Chapter 17, Title 28 of the ted States Code (Section 882 of the Revised Statutes of the United States), ereby certify that the annexed are true copies of Claim for Refund of 931.39, Estate Tax (with statement attached), filed by Norman W. Bingham, , Annie D. Upton and George Uptor, Executors of Estate of King Upton, late Marblehead, Massachusetts, c/o Norman W. Bingham, Jr., Boston, Massachusetts; y of letter, undated, to George Uptor, et al., Executors, Estate of King Upton, ton, Massachusetts, from Robt. H. Lucas, Commissioner.

on in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

W. A. Mirfield,

Chief Clerk, Treasury Department.

1930—TREASURY DEPARTMENT, CHIEF CLERK AND SUPERINTENDENT.

CLAIM FOR V 63

ABATEMENT OF TAX ASSESSED
CREDIT AGAINST OUTSTANDING ASSESSMENTS
X REFUND OF TAXES ILLEGALLY COLLECTED
REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

IMPORTANT
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

State of Massachusetts
County of Suffolk } ss:

NOTICE TO COLLECTOR
Collector must indicate in block above the kind of claim, except in Income Tax cases.

OFFICE OF INTERNAL REVENUE RECEIVED AUG 22 1925

Collection District
Account number
Date received

Norman W. Bingham, Jr., Annie D. Upton and George Upton
(Name of taxpayer or purchaser of stamps)

TYPE OR PRINT

Executors of Estate of King Upton, late of Marblehead, Mass.
(Residence—give street and number or post office, city or town and State)

C/o Norman W. Bingham, Jr., 31 Federal St., Boston, Mass.
(Business address)

This deponent, being duly sworn according to law, deposes and says that this claim is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

PERIOD	YEAR
From	
To	

1. Business in which engaged
2. Character of assessment or tax Estate Tax
(State tax or upon what the tax assessment is based, if stamps)
3. Amount of assessment or stamps purchased $ 3415.43
4. Reduction of Tax Liability requested (Income and Profits Tax) $
5. Amount to be abated $
6. Amount to be refunded (or such greater amount as is legally refundable) $ 1931.39
7. Date of payment (see Collector's receipts or indorsements of canceled checks) February 24, 1922
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed Boston, Mass.
9. District in which unpaid assessment appears
10. Amount of overpayment claimed as credit $
11. Unpaid assessment against which credit is asked, period from to $

Deponent verily believes that this application should be allowed for the following reasons:

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 7 day of August, 1925.

Signed Norman W. Bingham
for self and executors

(Title)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

8

CERTIFICATES

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Schedule No.

Name of taxpayer	Character of assessment and period covered.	Lin.	Year.	Month.	Page.	Line.	Amount.	Date paid.	District in which paid.
		F 30A	1922	Feb.	4	7	$ 5415 43	2/25/25	Mass
Estate of King Upton, N.W. Bingham, Jr. et al., Executors, Federal St., Salem, Mass.	Estate	"	1926	2d Sup.	1	4	39538 20		

Malcolm E. Nichols
Collector of Internal Revenue.

MCK
Asst.
Assistant Chief, Commissioner's Office.

Claim No.

I certify that the records of my office show the following facts as to the purchase of stamps:

To whom sold or issued.	Kind.	Number.	Denomination.	Date of sale or issue.	Amount.	If special tax stamp, state: Serial number.	Period commencing.
					$		

Collector ..... District .....

Schedule No.

Schedule Number .....

District .....

Allowed or Rejected Number .....

(Nature of tax.)

Claimant .....

Address .....

Examined and submitted for action 19

COMMITTEE ON CLAIMS

Claim examined by—
OKS
Claim approved by—
H. H. Chandler
Chief of Division.

Amount claimed... $.....

Amount allowed... $.....

Amount rejected... $.....

In accordance with the provisions of Section 402 (f) of the Act of 1918 and of Article 32 of Regulations 37, there was included in the return for Federal Estate tax filed for the estate of [illegible] Upton, late of Marblehead, Mass. by the executors of said estate, the amount of $39,284.96, representing insurance payable to individual beneficiaries. Of this amount $40,000 was exempt from tax, leaving a balance claimed by the Department to be taxable, and on which tax was paid, in accordance with said Section 402 (f) of said Article 32 of $40,282.96.

On May 22, 1925, the executors of said estate filed a claim for refund of $1931.39, being the amount of estate tax paid on said $40,282.96 at the rate of 4%. Taxpayers based that claim for refund on the decision of the District Court of the United States for the Western District of Pennsylvania in the case of Frick et al. v. Lewellyn, Collector.

To assist the Department in applying to this claim the principals enunciated by the Supreme Court in its opinion (May 11, 1925) deciding the above case, the following supplementary information is given concerning the policies in question.

The following policies which were included as a part of the gross estate of the decedent in the return for Federal estate tax filed by the taxpayers, were taken out by the decedent, and in case of change of beneficiary assigned to designated beneficiaries, before any estate tax act was passed. Under the decision of the Supreme Court the Act did not refer to transactions prior to 1916 and these policies should not have been included or considered at all in the return for Federal Estate tax:

Name of Company	No. of Policy	Date of Issue	Date of last assignment, if any	Name of Person Receiving Insurance	Full Amount Received
Berkshire Life Ins. Company	35090	June 1, 1871	July 25, 1904	Annie D. Upton	
" " "	41714	Oct. 11, 1893	" "	Annie D. Upton	
" " "	47984	Dec. 24, 1895	" "	Annie D. Upton	$14299.45
" " "	47985	Dec. 24, 1895	" "	Annie D. Upton	
Manhattan Life Ins. Company	60061	Oct. 9, 1888	----	Annie D. Upton	5000.00
" " "	60062	Oct. 9, 1888	-----	George Upton	5000.00
National Life Ins. Co. Montpelier, Vt.	85895	June 18 1892	July 28, 1904	Annie D. Upton	10072.51
Fidelity Mutual Life Ins. Co., Philadelphia, Pa.	209407	Dec. 7, 1908	-----	Annie D. Upton	10000.00
Connecticut Mutual Life Ins. Co.	168178	May 22, 1883	-----	Annie D. Upton	5035.37
					$49407.53

Following is a complete list of the policies of insurance taken out by the decedent, and in case of change of beneficiary assigned by him to designated beneficiaries, subsequent to the passage of the estate tax act:

Name of Company	No. of Policy	Name of Person Receiving Insurance	Full Amount Received
Mutual Benefit Life Ins. Co. Newark, N. J.	345891	Annie D. Upton	$5052.62
Berkshire Life Ins. Co. Pittsfield, Mass.	190589	Annie D. Upton	3035.04
Mutual Life Ins. Co. of N. Y.	383891	Annie D. Upton	5018.82
New England Mutual Life Ins. Co.	101312	Annie D. Upton	12387.60
New England Mutual Life Ins. Co.	110070	Annie D. Upton	3153.17
State Mutual Life Assurance Co. Worcester	27474	Annie D. Upton	3233.37
Fidelity Mutual Life Ins. Co.	202194	Annie D. Upton	6000.00
Connecticut General Life Ins. Co. Hartford	120389	Annie D. Upton	1000.00
			$38877.62

Conceding that the above insurance aggregating $38,877.62 may be included as a part of the gross estate of the decedent, nevertheless, as under Section 402 (f) of the Revenue Act of 1918, the estate is taxable only "to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life" no tax under policies taken out by the decedent upon his own life" no tax [illegible] policies of insurance taken out by the de-

the amount of $40,000, representing insurance payable to individual beneficiaries. Of this amount $40,000 was exempt from tax, leaving a balance claimed by the Department to be taxable, and on which tax was paid, in accordance with said Section 402 (f) of said Article 22 of $48,832.96.

On May 27, 1925, the executors of said estate filed a claim for refund of $1931.39, being the amount of estate tax paid on said $48,832.96 at the rate of 4%. Taxpayers based that claim for refund on the decision of the District Court of the United States for the Western District of Pennsylvania in the case of Frick et al. v. Lewellyn, Collector.

To assist the Department in applying to this claim the principals enunciated by the Supreme Court in its opinion (May 11, 1925) deciding the above case, the following supplementary information is given concerning the policies in question.

The following policies which were included as a part of the gross estate of the decedent in the return for Federal estate tax filed by the taxpayers, were taken out by the decedent, and in case of change of beneficiary assigned to designated beneficiaries, before any estate tax act was passed. Under the decision of the Supreme Court the Act did not refer to transactions prior to 1916 and these policies should not have been included or considered at all in the return for Federal Estate tax:

Name of Company	No. of Policy	Date of Issue	Date of last Assignment, if any	Name of Person Receiving Insurance	Full Amount Received
Berkshire Life Ins. Company	38098	June 1, 1891	July 28, 1904	Annie D. Upton	
" "	41714	Oct.11, 1893	" "	Annie D. Upton	
" " "	47984	Dec.24, 1898	" "	Annie D. Upton	$14299.45
" " "	47985	Dec.24, 1898	" "	Annie D. Upton	
Manhattan Life Ins. Company	60061	Oct.9, 1868	----	Annie D. Upton	5000.00
" " "	60062	Oct.9, 1868	-----	George Upton	5000.00
National Life Ins. Co. Montpelier,Vt.	55595	June 15 1892	July 28, 1904	Annie D. Upton	10097.51
Fidelity Mutual Life Ins. Co. Philadelphia,Pa.	209407	Dec. 7, 1909	-----	Annie D. Upton	10000.00
Connecticut Mutual Life Inst Co.	168178	May 22, 1883	-----	Annie D. Upton	5036.37
					$49407.33

Following is a complete list of the policies of insurance taken out by the decedent, and in case of change of beneficiary assigned by him to designated beneficiaries, subsequent to the passage of the estate tax act:

Name of Company	No. of Policy	Name of Person Receiving Insurance	Full Amount Received
Mutual Benefit Life Ins. Co. Newark, N. J.	383891	Annie D. Upton	$5082.63
Berkshire Life Ins. Co. Pittsfield, Mass.	180839	Annie D. Upton	5085.04
Mutual Life Ins. Co. of N. Y.	383891	Annie D. Upton	5015.82
New England Mutual Life Ins. Co.	101312	Annie D. Upton	12387.60
New England Mutual Life Ins. Co.	110070	Annie D. Upton	3183.17
State Mutual Life Assurance Co. Worcester	27474	Annie D. Upton	3233.37
Fidelity Mutual Life Ins. Co.	208194	Annie D. Upton	6000.00
Connecticut General Life Ins. Co. Hartford	126389	Annie D. Upton	1000.00
			$38877.63

Conceding that the above insurance aggregating $38,877.63 may be included as a part of the gross estate of the decedent, nevertheless, as under Section 402 (f) of the Revenue Act of 1918, the estate is taxable only "to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life" no tax is due on account of any policies of insurance taken out by the decedent.

Accordingly refund of $1931.39, being the amount of tax paid in reference to insurance taken out on the life of the decedent payable to individual beneficiaries is hereby respectfully requested.

NT-AT-C1-2773-AMB
District of Massachusetts
Estate of King Upton
Date of death - February 27, 1921

George Upton, et al., Executors,
Estate of King Upton,
121 Beverly Street,
Boston, Massachusetts.

Sirs:

Reference is made to the claim dated May 27, 1925, filed June 8, 1925, for refund of $1,931.39 Federal estate tax, alleged to have been erroneously collected from the above-named estate.

The claim is based upon the alleged erroneous inclusion in the gross estate of the amount of certain insurance policies. Certain of the policies were taken out or beneficiaries named subsequent to February 26, 1919, the effective date of the Revenue Act of 1918. As to certain other policies, it affirmatively appears that the decedent reserved incidents of ownership, such as the right to change the beneficiary. As to the remaining policies, it does not clearly appear that the decedent did not reserve incidents of ownership. Accordingly, the Bureau would not be warranted at this time in making any adjustment upon the merits.

The Bureau made its final determination of the liability of this estate and issued the statutory notice of deficiency on May 7, 1925. On March 15, 1926, the estate filed a further claim for refund, based upon the alleged erroneous inclusion in the gross estate of the value of property transferred by the decedent prior to his death. This second claim was rejected and suit instituted to recover the tax alleged to have been erroneously collected, the suit being based entirely upon the second claim. This suit proceeded to judgment and the judgment entered was satisfied. The suit was instituted on July 9, 1926, more than six months after the filing of the claim now under consideration.

At the time of the institution of the suit, the Bureau had made its final determination of the tax liability of this estate. The claim now

under consideration had been pending more than six months, could have been made the basis of an action, and should have been made part of the basis of the action which was brought. It therefore appears that the claim is now barred.

Accordingly, the claim mentioned in the first paragraph hereof is rejected in its entirety.

Respectfully,

Robt. H. Lucas,
Commissioner.

rwb

This cause was thence continued from term to term to the December Term, A. D. 1933, when, to wit, January 10, 1934, the Honorable Elisha H. Brewster, District Judge, sitting, said cause was set down for hearing on the statement of agreed facts and exhibits.

On the said 10th day of January, 1934, requests for findings of fact were filed by the petitioners and requests for rulings filed by the respondent.

Also, on the said tenth day of January, A. D. 1934, the following respondent's motion for judgment was filed:

RESPONDENT'S MOTION FOR JUDGMENT.

[Filed January 10, 1934.]

Now comes the respondent in the above-entitled action and on the pleadings and the evidence in the above-entitled case moves that judgment be entered for the respondent and against the petitioner with costs.

By its Attorneys,
FRANCIS J. W. FORD,
United States Attorney.
By: J. DUKE SMITH,
Special Assistant to the United States Attorney.

Aug. 7, 1934.
Motion denied,
E. H. B.,
D. J.

This cause was thence continued to the March Term, A. D. 1934, when, to wit, May 11, 1934, petitioners' request for rulings of law was filed by consent.

On the said 11th day of May, A. D. 1934, the following petitioners' motion for judgment was filed by consent:

PETITIONERS' MOTION FOR JUDGMENT.

[Filed by consent May 11, 1934.]

Now comes the petitioners and on the pleadings and evi-

dence move that judgment be entered for the petitioners as prayed for, with interest as provided by law, and costs.

By their Attorneys,

BURNHAM, BINGHAM, PILLSBURY, DANA & GOULD.

Aug. 7, 1934.

Motion allowed.

E. H. B.,

D. J.

This cause was thence continued to the June Term, A. D. 1934, when, to wit, August 7, 1934, said cause came on for further hearing on the agreed statement of facts, the Honorable Elisha H. Brewster, District Judge as aforesaid, sitting, and it was ordered by the court that the plaintiffs' requests for findings of fact, filed January 10, 1934, be granted, and No. 1 of the respondent's request for rulings be granted and No. 2 request, filed on said January 10, 1934, be denied, defendant's exceptions being saved.

Also on the said 7th day of August, A. D. 1934, it was ordered by the court that the said defendant's motion for judgment be denied, defendant's exceptions being saved.

Also on the same day, an opinion of the court was announced, judgment to be entered for the petitioners.

At the same term, to wit, August 15, 1934, a defendant's bill of exceptions was filed.

Said cause was thence continued to the present September Term, A. D. 1934, when, to wit, October 29, 1934, the defendant's bill of exceptions is allowed by the court.

On the 30th day of October, A. D. 1934, the following petitioners' motion for entry of judgment forthwith is filed:

PETITIONERS' MOTION FOR ENTRY OF JUDGMENT FORTHWITH.

[Filed and Allowed October 30, 1934.]

Now come the petitioners and say that on August 7, 1934,

this Court ruled that the petitioners were entitled to recover in this action in the sum of $1174.79, with interest from February 24, 1922, and the petitioners further represent that the respondent's Bill of Exceptions was allowed on October 29, 1934.

Wherefore, the petitioners move that judgment be entered for them forthwith in the amount of $1174.79, with interest thereon as provided by law from February 24, 1922, and costs.

By their Attorneys,
BURNHAM, BINGHAM, PILLSBURY, DANA & GOULD,
GEORGE S. FULLER.

Oct. 30, 1934.
Allowed.
E. H. B.,
D. J.

Thereupon, to wit, October 30, 1934, it is considered on the finding of the court, the Honorable Elisha H. Brewster, District Judge, sitting, that the said Norman W. Bingham, Jr., Annie D. Upton and George Upton, Executors of the Will of King Upton, petitioners, recover of the said United States of America, defendant, the sum of one thousand one hundred seventy-four dollars and seventy-nine cents ($1174.79), with interest thereon as provided by law from February 24, 1922, and their costs of suit taxed at.....

OPINION.

August 7, 1934.

BREWSTER, J. This action is brought by the executors under the will of King Upton to recover federal estate tax which, it is alleged, was erroneously exacted. The controversy arises over the action of the Commission in including in the gross estate of the decedent, under section 402 (f), seven policies of life insurance.

King Upton died February 27, 1921. During his lifetime he had taken out seventeen policies of insurance on his own life, the proceeds of which aggregated $88,284.96. After deducting the $40,000 exemption, the balance of $48,284.96 was included in the gross estate. It is conceded that the proceeds of ten policies were properly included in the estate. The petitioners contend that seven of these policies, the proceeds of which aggregated $29,369.86 were improperly included. Four of these policies were issued by the Berkshire Life Ins. Co. prior to 1896 and were originally payable to the estate of the insured without power to change the beneficiary or borrow on the policies. On July 25, 1904, the insured assigned to his wife Anna D. Upton, providing she survived, all his right, title and interest in these policies, reserving only the right to apply dividends to reduce premiums. Two of the policies were issued by the Manhattan Life Insurance Company prior to October, 1888. Both were payable to beneficiaries named therein, or their legal representatives, the first to the son and the second to the wife of the insured. One policy was issued by the Connecticut Mutual Life Insurance Company in 1883. This policy was payable to the wife of the insured or her legal representatives. Three of the Massachusetts policies and the Connecticut policy had provisions for paid-up and cash surrender values at stated periods. One of the Massachusetts policies had no such provisions, and the New York policies provided only for non-participating paid-up policies in case of forfeiture for non-payment of premiums.

In the view I take of the case, I deem it unnecessary to set forth in further detail the provisions of the several policies. It is enough to say that in none of them did the decedent have any right to change the beneficiary.

If these policies can be included at all in the taxable estate of a decedent, it must be by virtue of section 402 (f) of the Revenue Act of 1918, which reads as follows:

"Sec. 402. That the value of the gross estate of the

decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

"(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

The terms of this subdivision of section 402 are sweeping and embrace within its description the seven policies of life insurance involved in this controversy.

If the Revenue Act of 1918, so far as it sought to include in the gross estate of a testator insurance policies payable to a beneficiary other than the estate, applied to past transactions, the policies involved in this suit might require a consideration of the power of Congress to thus add to the estate of a deceased person, for the purpose of exacting an estate tax. (See *Nichols, Coll.* v. *Coolidge*, 274 U.S. 531. *Sampson* v. *United States*, 1 F. Supp. 95. *Chase National Bank* v. *United States*, 278 U.S. 327.) In *Llewellyn* v. *Frick*, 268 U.S. 238, the Supreme Court has, in no doubtful terms, declared that section 402 (f) of the Revenue Act of 1918 was never intended to apply to transactions taking place before the passage of the Act. Whether that case is authority for excluding from the operation of the Revenue Act all policies of insurance taken out before its enactment, payable to beneficiaries other than the executor, is a question that need not now be answered. The decision held that no one of the policies involved in the Frick case could be properly included in Frick's gross estate, whether it was a fully paid-up policy or otherwise.

The policies with which we are concerned in the case at bar fall within the Frick case. I regard that as controlling. The effect of it was not limited by *Chase National Bank* v. *United*

States, supra. In that case the Court was dealing with policies which had been taken out subsequent to the effective date of the Act imposing the tax.

So far as my conclusions are out of harmony with *Heiner* v. *Grandin,* 44 F. (2d) 141, I can only say that my views accord with those of Judge Buffington who wrote the dissenting opinion. Notwithstanding that certiorari was denied in the *Heiner* v. *Grandin* case, I shall await some clear and definite pronouncement from the Supreme Court before I shall feel at liberty to give the retroactive effect to section 402 (f) for which the government now contends.

I accordingly rule that the seven policies on the life of King Upton, which are now in controversy, should not have been included in the gross estate of the decedent, and that the petitioners are entitled to recover in this action $1174.79 with interest from February 24, 1922.

DEFENDANT'S BILL OF EXCEPTIONS.

[Filed August 15, 1934; Allowed October 29, 1934.]

This is a petition by Norman W. Bingham and others, executors under the will of King Upton, deceased, against the United States to recover Federal estate taxes alleged to have been erroneously and illegally assessed and collected in the amount of $1,931.39, with interest from February 24, 1922. The pleadings are a part of this record and may be referred to as part of this bill of exceptions. The case was tried before Brewster J., on January 10, 1934, on the pleadings, a statement of agreed facts, and Exhibits A, B, C, D, E, and F, being photostat copies of certain applications for life insurance policies (copies of which policies are attached to said statement of agreed facts) with all riders attached thereto and all endorsements thereon. Said exhibits are referred to in paragraph 6 of said statement of agreed facts. The said statement of agreed facts and all of said exhibits are incorporated into and made a part of this bill of exceptions by reference. The foregoing constitutes all the evidence in the case.

At the trial the respondent requested the court to find as a matter of law that the full amount of the proceeds of the seven life insurance policies in question, as set forth in paragraph 6 of said statement of agreed facts, was properly included in the decedent's gross estate under the provisions of Section 402 (f) of the Revenue Act of 1918.

At the trial the respondent filed the following written motion for judgment:

Now comes the respondent in the above-entitled action and on the pleadings and the evidence in the above-entitled case moves that judgment be entered for the respondent and against the petitioners with costs.

At the trial the petitioners filed the following requests for rulings of law:

Now come the Petitioners and request that, as to each of the policies referred to in sub-paragraphs (a), (b), and (e) of the Petition as amended, the Court make the following ruling of law:

That no part of the proceeds of the policy constituted a part of the gross estate of the decedent under the estate tax provisions of the Revenue Act of 1918.

At the trial the petitioners filed the following written motion for judgment:

Now come the Petitioners and on the pleadings and evidence move that judgment be entered for the Petitioners as prayed for, with interest as provided by law, and costs.

The trial was continued generally and on August 7, 1934, during the course thereof, the court denied the respondent's said request for a ruling of law and its said motion for judgment and the respondent saved its exceptions. During the course of the trial the court granted all of the petitioners said requests for rulings of law and their said motion for judgment, and the respondent saved its exceptions. On the same day the court handed down a written opinion in which it held that no portion of the proceeds of the insurance policies in question was properly included in the gross estate

of the decedent under the provisions of Section 402 (f) of the Revenue Act of 1918.

The respondent being aggrieved by the denial by the court of its said request for a ruling of law and its said motion for judgment and in granting the petitioners' said requests for rulings of law and said motion for judgment and by the findings and rulings of the court, now excepts to said findings and rulings of the court, and therefore brings this bill of exceptions and prays that it may be allowed.

By its Attorneys,

FRANCIS J. W. FORD,
United States Attorney.
By: J. DUKE SMITH,
Special Assistant to the United States Attorney.

Assented to:

BURNHAM, BINGHAM, PILLSBURY, DANA & GOULD,
GEORGE S. FULLER,
Attorneys for the Petitioners.

Allowed Oct. 29, 1934.

ELISHA H. BREWSTER,
United States District Judge.

STIPULATION AS TO THE RECORD.

[Filed November 5, 1934.]

It is hereby stipulated by the parties hereto that there shall be omitted from the exhibit which is a copy of the application for the Connecticut Mutual Life Insurance Company policy referred to in the Bill of Exceptions the questions and answers numbered 5 to 18 inclusive on said application as they have no bearing upon any of the issues involved.

It is hereby further stipulated by the parties hereto that there shall be omitted from each of the exhibits which are copies of the applications for the Berkshire Life Insurance Company policies referred to in the Bill of Exceptions that

part of each such application which relates to the medical examination as it has no bearing upon any of the issues involved.

NORMAN W. BINGHAM, JR., ET AL.,
Executors under the Will of King Upton.
By their Attorneys,
BURNHAM, BINGHAM, PILLSBURY, DANA & GOULD,
GEORGE S. FULLER.

THE UNITED STATES OF AMERICA,
By FRANCIS J. W. FORD, *United States Attorney.*
By J. DUKE SMITH, *Special Assistant to the United States Attorney.*

Seal 75722
Dagle Et A
1-10-24

APPLICATION FOR INSURANCE UPON THE LIFE OF [illegible] TO BE ISSUED IN THE

BERKSHIRE LIFE INSURANCE COMPANY,

OF PITTSFIELD, MASS.

Questions to be Answered by the Person whose Life is to be Insured, the Answers forming part of the Contract of Insurance.

1. Name of the proposed insured: Thing Hoffer
   Present Occupation: Farmer
   Residence: Salem
   County: Essex
   State: Illinois
   Post Office Address: Salem R.F.D. 289
2. How much insurance do you apply for? $10,000.00
   From what company do you propose to take it? Life Mass
   Has the premium been paid to the date of this application? Yes
3. For whose benefit is this insurance to be effected? Wife
   What relationship to or interest in the life insured? Wife
   Has any Loan thereon been made or any lien created thereon? If so, state the amount thereof, and to whom the same is to be paid. No
4. Place of your birth: Franklin Illinois
   Date of your birth: April 12, 1862
5. Are you married or a widower? Married
6. Have your Grandparents or any of their descendants been afflicted with Insanity, or any Pulmonary or Scrofulous Hereditary Diseases? If so, state particulars: None known to applicant
7. a. Age attained by Grandparents, state whether living or dead? a. Father's Father, Father's Mother, Mother's Father, Mother's Mother.
   b. Age attained by parents, state whether living or dead? b. Father, Mother,
8. a. Is there now any insurance on your life? Ans. Yes
   b. If in this Company, state the No. of Policy and amount. Ans. No. for
   c. If in other Companies, state name of each. Ans. In the John Hancock Co. for $10,000 In the Equitable Co. for $10,000
      Company, and amount insured in each. In the Mutual Life Co. for $10,000 In the Mutual N.Y. Co. for $8000
   d. Has an application ever been made for insurance on your life on which a Policy was not issued, or have you any application now pending? Ans. Yes
   e. Has any Physician given an opinion that you were not safe insurable? Ans. No

I Hereby Declare that the answers to the foregoing questions are true

Witness: Mary E. Jones

Dated at Berlin, Ill., 1924

Date paid July 1, 1924

(Signature of the person proposed for insurance.)

IT IS HEREBY DECLARED AND WARRANTED that all the statements and answers as above made are complete and true and that they are to be the declaration and agreement constituting an application for a policy of insurance and are offered as a consideration and the premium paid, while the person whose life is proposed for insurance is in good health, and the first premium thereon paid, while the person whose life is proposed for insurance is in the same condition of health, described in the answers to the questions in this application, and no contract or insurance shall be a part thereof and the policy shall not take effect unless delivered at all times and places in the state of Illinois

Witness: Mary E. Jones

Date: 1924

Witness: Mary E. Jones

Witness: Lyttell

Agent

Lawn 40920
Dept's Ex B
1-18-39
answ

APPLICATION FOR INSURANCE UPON THE OPTIONAL PLAN

I hereby apply to THE BERKSHIRE LIFE INSURANCE COMPANY of Pittsfield, Mass

FOR A POLICY of $ 5,000. on my life upon the Ord. Pay. Premiums Payable Semi-annually

1.—My full NAME is Irving Applebaum and I BELONG to the White

County of Essex State of Mass My former race was White

2.—My PLACE OF BUSINESS is 111 N. La Salle St Chicago and my P. O. Address is 31 Milk St. Boston Mass.

My present OCCUPATION OR BUSINESS is Manufacturer My other occupations are None

My former occupation have been Same

3.—I have no intention of changing my residence or occupation as stated except Not expected.

4.—I was BORN on the 1st day of April 1894 in Lowell, Mass.

5.—The full name of the person to whom the Insurance is PAYABLE as BENEFICIARY is My wife Ruth

Residing in Same

6. The relationship of the Beneficiary to me is The person insured is

7. I have BEEN INSURED in this company under the number No. 5,000. and AM NOW INSURED FOR $ 5,000. and have also in the following companies: Mass Mutual $5,000. Connecticut Mutual $5,000. Penn Mutual $5,000. Equitable $5,000. Northwestern Mutual $5,000. and have NOW PENDING applications for the following companies: None

8. The following are all the Companies or Associations to which I have ever applied for any Life Insurance which have been REFUSED or to which I am asked for or POSTPONED: None

IT IS HEREBY DECLARED AND WARRANTED that all the foregoing statements and answers are complete and true, and, together with the [illegible] agreement, constitute all the [illegible] and are offered as a consideration for the issuance of a policy of insurance upon the life of the undersigned; and it is agreed that the Company shall not be bound by anything said by any agent or person not herein contained, nor shall any such agent or person have power to make any contract for the Company, or to waive any of its rights or requirements; and if said policy shall be issued, it shall be upon the express condition that the insured is in good health and has not consulted a physician since the date of the medical examination, except as stated therein; and the acceptance of such policy shall be a ratification by the insured of any alteration or correction made by the Company in this application before the delivery of the policy.

It is agreed that in any distribution of surplus the person whose life is insured may be accepted by the Company as a participant in such surplus, and that all the provisions of the policy relating to such participation, shall be and are hereby made a part of this application. If the premium paid with this application be not accepted by the Company, it is agreed that the amount paid shall be returned promptly to the person whose life is insured; and if the policy be issued, the first premium shall be paid after and not before the delivery of the policy, and the policy shall not take effect unless and until the first premium is paid during the lifetime and good health of the person whose life is insured; and if accepted by the Company, it is agreed that the amount paid with this application shall be credited on the first premium, and that the receipt for the first premium shall be given to the insured and not to any agent or other person, and that no agent or other person has authority to make, modify or discharge any contract of insurance, or to extend the time for the payment of any premium, or to bind the Company by making any promise concerning a policy or the death of the insured shall be given to the Company at its office in Pittsfield, Mass.

Dated at Boston Nov 22 1938 Policy to be dated Nov 22 1938

Signed in presence of [illegible] Agent Irving Applebaum

Law 4592
Dft. Ex C
1-10-17

COPY PLICATION FOR INSURANCE UPON THE OPTIONAL PLAN

I hereby apply to THE BERKSHIRE LIFE INSURANCE COMPANY of Pittsfield, Mass.

FOR A POLICY of $ 5000 on my life upon the [illegible] Premiums Payable [illegible]

1.—My full NAME is [illegible] and I RESIDE at [illegible]

County of [illegible] State of [illegible] My former place was [illegible]

2.—My PLACE OF BUSINESS is [illegible] and my P. O. Address is [illegible]

My present OCCUPATION OR BUSINESS is [illegible] My other [illegible]

My former occupations have been [illegible]

3.—I have no intention of changing my residence or occupation above stated except [illegible]

4.—I was BORN on the [illegible] day of [illegible] 1862 in [illegible]

5.—The full name of the person to whom the Insurance is to be payable (BENEFICIARY) is [illegible]

Residing in [illegible]

6.—The relationship of the Beneficiary to me (The person applying for Insurance) is [illegible]

7.—I have BEEN INSURED in this company under [illegible] policies, No. 23091 $ [illegible] No. [illegible] $ [illegible] No. [illegible] $

and AM NOW INSURED FOR $ 4500 — in the following Companies or Associations to wit [illegible]

John Hancock $5000 [illegible] Equitable Life Assurance Society $5000

State [illegible] Mutual Life $5000 [illegible]

and have NOW PENDING applications for insurance in the following Companies: None accepted at Portland 5000 today. Mass Mutual $5000 dated Oct 1842 - 10,000 dated Dec 1842

8.—The following are all the Companies or Associations to which I have ever applied for any Life Insurance which has been REFUSED or on which I am asked for, or POSTPONED: [illegible]

IT IS HEREBY DECLARED AND WARRANTED that all the foregoing statements and answers, as well as the [illegible] application, are complete and true, and together with the [illegible] of insurance and are offered as a consideration for the [illegible] not be binding until said policy shall be issued and [illegible] scribed in the application, and if said policy is issued [illegible] have an interest therein; and the said Declarant [illegible] It is agreed that in any settlement of surplus, [illegible] equitably belonging to such policy, shall be, and [illegible] life is insured may be accepted by the Company in [illegible] of the death of the insured shall be given by the [illegible]

[illegible] Company's Medical Examiner in continuation of this [illegible] COMPANY of Pittsfield, Massachusetts, for a policy [illegible] which is a contract, but which, however, shall [illegible] days for the [illegible] is in the condition of health des[illegible] upon the [illegible] who have, or may after wards [illegible] the [illegible] and [illegible] such [illegible] condition, and [illegible] benefits [illegible] and that the [illegible] of the amount [illegible] and [illegible] and that the person whose [illegible] the assured. It is also agreed that [illegible] and before [illegible] year after the said death.

Dated at Portland Dec 6th 1862 Policy to be dated [illegible] 1862

Signed in presence of [illegible] Agent

Signature of applicant whose life is proposed for insurance [illegible]

Loan 4582
Dept. E.D.

COPY PLICATION FOR INSURANCE UPON THE OPTIONAL PLAN

I hereby apply to THE BERKSHIRE LIFE INSURANCE COMPANY of Pittsfield, Mass. 1-10-94

FOR A POLICY of $ ... on my life upon the ... Plan. 1st Premium Payable ... Ans

1.—My full NAME is ... and I RESIDE in ...

County of ... State of ... My former residence was ...

2.—My PLACE OF BUSINESS is ... and my P. O. Address is ...

My present OCCUPATION OR BUSINESS is ... My other occupations are ...

My former occupations have been ...

3. I have no intention of changing my residence or occupation as above stated except ...

4. I was BORN on the ... day of ... in ...

5.—The full name of the person to whom the Insurance shall be payable, the BENEFICIARY, is ...

Residing in ...

6.—The relationship of the Beneficiary to me (if *not personal for Insurance*) is ...

7. I have BEEN INSURED in this company under the following policies, Viz: ... Still in force $ ... No. ...

and AM NOW INSURED FOR $ ... in the following companies or Societies, to wit: ...

and have NOW PENDING applications for ... in the following Companies: ...

8. The following are all the Companies or Associations with which I have ever applied for any Life Insurance which has been REFUSED or declined or POSTPONED: ...

IT IS HEREBY DECLARED AND WARRANTED that all the foregoing statements and answers, as well as those in the Medical Examination and Agreement, constitute an application to The Berkshire Life Insurance Company of Pittsfield, Mass., for the insurance above applied for, and are offered as a consideration thereof, and shall form the basis of the contract which may be issued hereon, and are to be considered as incorporated in such contract, and it is agreed that no statement or representation not contained in this application shall be binding upon either party, unless herein made or endorsed, and that no agent has authority to make or modify any contract of insurance, or to extend the time of any payment, or to waive any of the Company's rights or requirements. It is agreed that the insurance hereby applied for shall not take effect unless and until the first premium thereon is paid during the lifetime and good health of the person proposed for insurance, and that the receipt to be given therefor shall contain no guarantee or promise other than that the Company will, upon such payment, issue a policy in accordance with the terms of the application, and that the Company shall not be liable for any greater amount than the reserve value of the policy applied for, until the same shall have been delivered to and accepted by the insured while in good health, and the first premium thereon actually paid. It is agreed that the Company shall have the right to decline this application at any time before the delivery of the policy hereby applied for, and that in case of such declination all moneys paid hereon shall be returned to the undersigned. It is agreed that the Company shall not be liable for any greater amount than the reserve value of the policy applied for, until the same shall have been delivered to and accepted by the insured while in good health, and the first premium thereon actually paid. It is agreed that this application and the policy issued hereon shall constitute the entire contract between the parties, and that no agent has authority to alter or modify any of the terms of this contract, or to make any promise or representation not contained herein or endorsed hereon, and that no such promise or representation shall be binding upon the Company

Lease 4092
Deeds G. E. H. I. W.
4-44 10-27
cancd

New York, Oct 5 1868

I hereby apply to the **MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK**

for $ 10,000 *of Insurance on my life.*

PREMIUM *Annually.*
HOW ~~Semi-annually~~
PAYABLE. ~~Quarterly~~

ON WHAT TABLE. *Ordinary Life Non participating*

Life Premiums.

year Endowment.

premiums payable in years.

~~with~~ without *return of premiums.*

Survivorship Dividend Period years.

1. My full name. King Upton

2. Occupation (in full). If a clerk, salesman, or clerk, state definitely in what branch of business. Manufacturer of Glass

3. Residence. City Salem County Essex State Mass

4. Place of Business. If in the employ of any firm, company or business, give exact name of employer. Boston No. 239 St. Franklin

5. P. O. Address. Boston

6. Place of birth Peabody Mass 7. Date of birth April 19th 1862

8. Full name and residence of the person to whom the insurance is to be made payable. Annie D Upton Wife Geo. Upton 3000

9. Relationship of beneficiary to the person whose life is proposed for insurance. Wife and Son

10. The name of every Life Insurance Company to which application to write on my life has been made and the insurance effected, including any Company before which application or information is now pending. John Hancock. Conn Mutual. Home Circle Fallon Mutual

11. The name of every Life Insurance Company in which I am or have been insured, with the amount in each case. John Hancock 1000 Conn Mutual 5000 Home Circle 5000 Union Mutual 5000

12. I have resided in Salem for 6½ years past.

13. If any intention exists of changing residence or occupation, state in what manner. None

14. I am temperate in my habits, and am, to the best of my knowledge and belief, in sound physical and mental condition, have no disease, and am a satisfactory subject for life insurance.

I hereby warrant that the above statements and answers are full, complete and true in every particular, and they are offered as a consideration for the insurance applied for; but it is agreed that there shall be no contract of insurance until a policy shall be issued by the Company, and accepted subject to the stipulations and conditions therein contained.

(Signature of person whose life is proposed for insurance.) King Upton

Witness Nathan Crowell

Loan 45925
Dft; 4 Ft.
Conn-84
Conn

COPY OF APPLICATION FOR INSURANCE IN THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,

WHICH IS A PART OF THE CONTRACT OF INSURANCE.

1. Name of the Person whose life is proposed for insurance? WRITE THE NAME IN FULL. King Upton

Present occupation, Farmer — Former occupation, Same — RESIDENCE? Place, Salem; County, Essex; State, Mass

2. a. How much insurance is desired? Ans. $ 5000 — Five Thousand Dollars. b. What form of Policy is desired? Ans. 10 Payt. Life

3. Is it desired to pay the premium in semi annual instalments? (If so paid an addition to the cash payment is required to compensate the Company for the additional labor and expense and the delay in collection of deferred part of premium.) Ans. No

4. a. When and where were you born? Ans. In Peabody, State or Country Mass, On the 17 day of the month of April in the year 18 62 — b. What will be your age at next birthday? Ans. 22 years. Are you married? Ans. Yes

10. To whom is this Insurance payable in case of loss? Annie Upton — Relationship to the Life Insured. wife

11. To whom is it payable in case of Endowment Insurance, if the person insured survives the term, and to whom is the Policy to be surrendered for a cash value as therein provided? Myself

IT IS HEREBY DECLARED AND WARRANTED that the above are in all respects fair and true Answers to the foregoing Questions; and that no evidence respecting any matter inquired of in said Questions, other than those above made, have been made to any Agent, Solicitor, Examiner, or other person, on behalf of the Company; and it is acknowledged and agreed by the undersigned that this Application and Warranty are a part of the consideration for, and shall form a part of, the Contract of Insurance; and that if there be, in any of the Answers herein made, any untruth, evasion, or concealment of Facts, then any Policy granted upon this Application shall be null and void; and all payments made thereon shall be forfeited to the Company. And it is further declared by the undersigned, that the Party making this Application has an insurable interest in the Life above proposed for Insurance to the full amount above applied for. It is agreed that the Policy hereby applied for shall, if granted, be held to be issued and delivered at Hartford, in the State of Connecticut, and shall be in all respects construed and determined in accordance with the laws of that State, and that the provisions in said policy for its continuance as Paid-up Insurance for a specified amount in case of failure to pay premiums, are and shall be in substitution for and in waiver of the rights of all parties hereto under any law of any State relating to the issue and forfeiture of policies of life insurance.

Dated at Peabody Mass

this 18th day of May 1883

Witness to the Signing Hereof, S. B. Fay

Signature of the person or persons by whom benefit the Insurance is to be effected. (Write the names in full.) Annie Upton by King Upton

Signature of the person whose Life is proposed for Insurance. (Write the names in full.) King Upton

From the foregoing judgment, the United States of America, defendant, claims an appeal to the United States Circuit Court of Appeals for the First Circuit, on November 5, 1934, said appeal being allowed by the court on the same day.

ASSIGNMENT OF ERRORS.

[Filed November 5, 1934.]

The respondent in this case in connection with its petition for appeal makes the following assignment of errors which it avers occurred upon the trial of the cause, to wit:

I. That the District Court erred in ruling that the petitioners are entitled to recover.

II. That the District Court erred in refusing to make the following ruling of law requested by the respondent:

> That the full amount of the proceeds of the seven policies in question, as set forth in paragraph 6 of the Statement of Agreed Facts filed herein, was properly included in the decedent's gross estate under the provisions of Section 402 (f) of the Revenue Act of 1918.

III. That the District Court erred in ruling that no portion of the proceeds of any of the insurance policies in question was properly included in the gross estate of the decedent under the provisions of Section 402 (f) of the Revenue Act of 1918.

IV. That the District Court erred in denying the respondent's motion for judgment.

Wherefore, the respondent prays that the judgment be reversed and that the District Court be ordered to enter an order reversing the judgment of the District Court in said cause.

By its Attorneys,

FRANCIS J. W. FORD,
United States Attorney.

By: J. DUKE SMITH,
Special Assistant to the United States Attorney.

A citation on appeal was issued on November 5, 1934, being made returnable in the U. S. Circuit Court of Appeals on December 5, 1934. Service of said citation was duly acknowledged by the attorney for the petitioners.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,

District of Massachusetts, ss.:

I, JAMES S. ALLEN, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on the appeal of the defendant, including true copies of such proofs, entries and papers on file as have been agreed upon in the cause entitled,

No. 4592, Law Docket;

NORMAN W. BINGHAM, Jr., et al.,

Executors of the Will of King Upton, Petitioners,

v.

UNITED STATES OF AMERICA,

in said District Court determined.

And I further certify that transmitted herewith are the originals of the petition for appeal and the citation on appeal with the acknowledgment of service of citation on appeal.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this tenth day of December, A. D. 1934.

JAMES S. ALLEN, *Clerk.*

[MEMORANDUM. An order of enlargement of time for docketing case to, and including, December 10, 1934, is here omitted. A. I. CHARRON, *Clerk.*]

[fol. 83] In United States Circuit Court of Appeals for the First Circuit, October Term, 1934

No. 2983

United States of America, Defendant, Appellant,

v.

Norman W. Bingham, Jr., et al., Executors, Petitioners, Appellees.

Appeal from the District Court of the United States for the District of Massachusetts.

Before Bingham, Wilson and Morton, JJ.

Opinion of the Court—March 26, 1935.

Wilson, J.:

This is an appeal from the judgment of the District Court of Massachusetts in a proceeding to recover a refund of an estate tax assessed under Sec. 402 (f) of the Revenue Act of 1918 and paid by the executors.

The basis of the tax was seven insurance policies, all taken out by the testator prior to 1900 and either assigned to his wife or made payable to his wife or son.

Four policies issued by the Berkshire Life Insurance Company, a Massachusetts company, were originally payable at the death of the testator to his executors, administrators or assigns. In June, 1904, the testator assigned the four policies to the Company as security for a loan of $5,900, which was outstanding at his death on February 27, 1921.

In July, 1904, the testator assigned the four policies, subject to the prior assignment, to his wife, provided she survived him.

[fol. 84] A fifth policy was issued by the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, and named the wife of the testator as beneficiary, with a provision that if she did not survive him, it was payable to his children; and if there were no children or descendants thereof living at his death, it was payable to his estate. It was also further provided that at the end of ten years, it

being a ten payment life policy, the insured could himself draw the cash value of the policy, or at the end of each five year period thereafter. The testator did not avail himself of the provision before his death, the last five year period ending May 22, 1918, and the next five year period did not end until 1923, more than two years after his death.

The sixth and seventh policies were issued by the Manhattan Life Insurance Company of New York, one of which was made payable to his wife, and the other to his son. Neither contained a provision for a cash surrender value or the right to change the beneficiary.

The Commissioner of Internal Revenue included in the gross estate of the testator the proceeds of all of the policies above the exemption provided in Sec. 402 (f) of the Act of 1918. His ruling was rejected by the District Court on the authority of Llewellyn v. Frick, 268 U. S. 238, on the ground that the policies were all issued prior to the enactment of the Revenue Acts, and Sec. 402 of the Revenue Act of 1918 was not made retroactive.

An examination of the Frick case, however, leads us to the conclusion that it is not determinative of the present case. While it is claimed that some of the policies in the Frick case, though payable to his wife and children, contained provisions for a change of beneficiaries, these provisions, if they existed, were not referred to by the court in its opinion. The contentions raised in that case were directed more particularly to the constitutionality of Sec. 402 of the 1918 Act on the ground that there was no transfer of property of the testator at death, and that the pro- [fol. 85] ceeds of insurance policies belonged to the wife and daughter, and, therefore, could not be taxed as property passing at the testator's death.

The court said: "that at least there would be a very serious question to be answered before Mrs. Frick and Miss Frick could be made to pay a tax on the transfer of his estate by Mr. Frick. (See Sec. 408 of 1918 Act). There would be another if the provisions for the liability of beneficiaries were held to be separable and it is proposed to make the estate pay a transfer tax for property that Mr. Frick did not transfer." It avoided a decision of these questions by holding that the statute of 1918 was not retroactive and, therefore, did not apply to policies issued prior to the enactment of the Revenue Acts imposing estate taxes,

adding, as its reason for this interpretation that, "Acts of Congress are to be construed if possible in such a way as to avoid grave doubts of this kind."

Since this decision the Supreme Court has more clearly defined what passes at death in the case of trusts and insurance policies, and held that, if the vesting of the property in a donee, grantee or beneficiary is not complete until the death of the grantor, donor, or testator, and there is a complete shifting of the economic interest at death, there is a transfer subject to a tax under the Revenue Acts.

It is "transfers at death," as later interpreted by the Supreme Court in Chase National Bank et al. v. United States, 278 U. S. 327; Reinecke v. Northern Trust Co., 278 U. S. 339; Tyler et al. v. United States, 281 U. S. 497; Klein et al. v. United States, 283 U. S. 231; and Third National Bank & Trust Co. of Springfield et al. v. White, 45 Fed. (2d) 911, affirmed in 287 U. S. 577, that are taxed under the Acts of 1918 and 1921.

While the insurance policies in the case of Chase National Bank et al. v. United States, supra, were issued after the passage of the Act of 1918, the court held that in case of a reservation of a right to change beneficiaries:

[fol. 86] "It is true, as emphasized by plaintiffs, that the interest of the beneficiaries in the insurance policies effected by decedent 'vested' in them before his death and that the proceeds of the policies came to the beneficiaries not directly from the decedent but from the insurer. But until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them. The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, as is true of the termination by death of any of the other legal incidents of property through which its use or economic enjoyment may be controlled.

"A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors, Cohen v.

Samuels, 245 U. S. 50 (see Burlingham v. Crouse, 228 U. S. 459), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts, N. Y. Domestic Relations Law, c. 14, Consol. Laws Sec. 52; Kittel v. Domeyer, 175 N. Y. 205; Guardian Trust Co. v. Straus, 139 App. Div. 884, aff'd 201 N. Y. 546, is by no means the least substantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death."

The court in this case, referring to the case of Saltonstall v. Saltonstall, 276 U. S. 260, as supporting its conclusion, said, p. 336, 337:

"But we think that the rule applied in Saltonstall v. Saltonstall, supra, to a succession tax is equally applicable to a transfer tax where, as here, the power of disposition is reserved exclusively to the transferor for his own benefit. Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers."

[fol. 87] We think this case disposes of the constitutional objection to the provisions of the Acts of 1918 and 1921 raised in the Frick case, and it matters not that the policies were issued prior to the enactment of these Acts, if the testator still retained control of the policies and retained an interest therein which passed by his death to the beneficiary or assignees after these Acts were passed.

This interpretation has been followed in all decisions of the Circuit Courts of Appeals following the decision in the Chase National Bank Case; Heiner v. Grandin, 44 Fed. (2d) 141; Liebes v. Commissioner, 63 Fed. (2d) 870; Levy's Estate v. Commissioner, 65 Fed. (2d) 412; Cook et al. v. Commissioner, 66 Fed. (2d) 995; Scott et al. v. Commissioner, 69 Fed. (2d) 444. In Heiner v. Grandin, there was a minority opinion following the opinion in the Frick case; but the Grandin case was decided before the decision in the

Chase National Bank case. After the decision in the Chase National Bank case, there was a reargument in the Grandin case, and the court in a Per Curiam, 56 Fed. (2d) 1082, affirmed the majority opinion in 44 Fed. (2d) 141. Certiorari was denied, 286 U. S. 561.

We think that under the decisions of the Supreme Court since the Frick case, the four Berkshire policies were taxable. The wife of the testator under these policies received by the assignment of these policies only a contingent interest, unless she survived the testator. Not until his death was her interest therein complete. Therefore, there passed to her at his death an additional interest in the proceeds of the policies which occurred while the Act of 1918 was in effect.

The proceeds of the Connecticut policy must also be held taxable, subject to the limitation contained in Sec. 402 (f) of the 1918 Act. The Supreme Court in the Chase National Bank case also said, p. 337:

"Obviously the word 'transfer' in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include [fol. 88] the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another."

The beneficiary, under this policy did not have an absolute right to the proceeds, since it was dependent on her surviving the insured. In case she did not survive him, it was payable to the insured's children, or, if there were no such children of descendants thereof living at his death, the proceeds were made payable to the legal representative of his estate; and inasmuch as the testator reserved the right to demand its cash surrender value on the day it became a paid-up policy, and at the end of each five year period thereafter, until his death, he had an interest in the policy; and his wife's absolute right to the proceeds was conditioned, not only on her surviving him, but also on his failing to survive each five year period. It was his death before hers which finally terminated his rights under the policy and rendered the rights of the beneficiary absolute

and complete. It is obvious, we think, that the wife's rights under the policy were enlarged by his death.

In the Manhattan policies no right of cash surrender or to change the beneficiaries was provided. The insured had no interest in these policies that could be terminated at his death. His failure to pay the premiums might terminate the interest of the beneficiary, but it would terminate no interest that could possibly revert to or benefit him. Therefore, no estate tax should have been assessed on the Manhattan policies.

The judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

OPINION (Dissenting in Part)

BINGHAM, J. (dissenting in part).

This case presents the question whether the Commissioner of Internal Revenue was authorized to include the proceeds of seven policies on the life of the testator, King Upton, in his gross estate and impose thereon a tax under Section 402 (f) of the Revenue Act of 1918. Four of these policies were assigned to his wife, provided she [fol. 89] survived him. In two other policies his wife was the beneficiary in one and his son in the other. The remaining policy named the wife as beneficiary and provided that, if she did not survive him, it was payable to his children. This policy (the Connecticut one) contained a further provision giving the testator a recurrent power, the terms of which are hereafter given in full.

The testator died February 27, 1921, without having exercised the power at any recurrent period.

All of these policies are in excess of the $40,000 exemption on policies payable to beneficiaries other than to the estate of the decedent, provided for in Section 402(f) of the Act of 1918, and the main question in determining the right to include the avails of the Connecticut policy in the gross estate and subject them to taxation is whether, at the time of the testator's death, he had an interest in the policy which passed to the beneficiary or a power which he could have exercised at the time of his death.

As to the first four policies (those of the Berkshire Life Insurance Company) and the other two (those of the Man-

hattan Life Insurance Company) I am in entire accord with the conclusion reached as to each in the opinion of the court, but as to the remaining one (the Connecticut policy), it does not seem to me that the testator, at the time of his death, had any interest in that policy which passed to the beneficiary or any power which he could then exercise for the benefit of his estate, and that, unless he had a power over the proceeds of this policy which he could then exercise, the Commissioner erred in including its avails in the decedent's gross estate, for otherwise every interest in the policy vested in the beneficiary when it was taken out. Chase National Bank v. United States, 278 U. S. 327, 334.

The policy in question was for the sum of five thousand dollars, and was payable to Annie Upton, the wife of the insured. It contained a cash surrender clause which might [fol. 90] be exercised under certain conditions by the insured after the expiration of ten years from the date of the policy (May 22, 1883), and at the end of each five year period thereafter, reading as follows:

"And at the end of ten years from the date hereof, or at the end of each period of five years thereafter, this Policy having been in force during such entire periods for the full sum first above named as insured hereby and not otherwise, this Company will pay a Cash Value therefor, to be ascertained by the Table of Cash Values endorsed hereon and hereby made a part of this Contract; such Cash Value to be payable at its said office upon surrender hereof within thirty days after the end of each such period, to, and this Policy to be first released and discharged to the satisfaction of said Company by King Upton, the Insured;"

The policy having been taken out May 22, 1883, the end of the ten-year period was May 22, 1893, and the end of the last five-year period that ocurred before his death and when the testator could have exercised the power, was May 22, 1918, at which time he had thirty days in which to do so. He did not exercise the power on May 22, 1918, or within thirty days thereafter, or at the end of any prior period; and from May 22, 1918, down to the time of his death, February 27, 1921, he had no power which he could have exercised over the avails of the policy for the benefit of his estate or for anyone else. It therefore cannot be said that, at the time of his death, he had a power over the cash value of

this policy which he then could have exercised and that, by his failure to do so, an interest passed to his wife. Had he lived until May 22, 1923, he would have acquired a power which he could then have exercised, but he did not live to that time and had no such power at the time of his death.

It is fairly certain that the decision in Chase National Bank v. United States, supra, is not controlling here, for in that case the decedent had a power which he could have exercised at the time of his death for the benefit of his estate, and his failure to do so transferred an interest to the beneficiary. Not so here.

[fol. 91] Neither does it seem to me that the decision in Tyler v. United States, 281 U. S. 497, is controlling here. There the relevant provisions of the taxing statute were Sections 202 and 202 (c). In 202 (c) Congress manifested an intention to tax the interest of a deceased tenant by the entirety by specifically providing that the interest of a tenant by the entirety, except such part thereof as might be shown to have originally belonged to some other person and never to have belonged to the decedent, should be included in his gross estate; and the only question was whether Congress had the power to impose such a tax, inasmuch as, at common law, no interest in property held by husband and wife by the entirety passed at the death of either to the survivor. But Congress having specifically provided that such an estate should be included for taxation in the gross estate of a decedent, if created by him out of his estate, and it appearing that the estate by the entirety was created out of the decedent's estate, and, as a matter of fact, though not as a matter of law, the estate of the wife was enlarged by the death of the husband, and "because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; * * * and became entitled to hold and enjoy it absolutely as her own; and * * * of disposing of the property by an exercise of her sole will," the court, in that case, was of the opinion that Congress had the power, under the Constitution, to tax such an interest. There the decedent, down to the time of his death, had an interest in the entirety which he could enjoy, including all the income. Cooley v. Commissioner 74 Fed. (2d) decided January 31, 1935. But here the decedent had no interest in the policy or power of control over it which he could exercise at the time of death. The wife's title to the proceeds of the policy was

complete before his death. He could not at the time of death defeat it and his death did not perfect her title or enlarge her estate. The situation existing at the time of his death is or should be controlling, not what it might be at some other time.

[fols. 92 & 93] On January 9, 1935, this cause came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the twenty-sixth day of March, A. D. 1935, the opinion of the court (page 83) and a dissenting opinion by Bingham, J. (page 88), were filed and the following Judgment was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—March 26, 1935

This cause came on to be heard January 9, 1935, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, March 26, 1935, here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

Arthur I. Charron, Clerk.

RECITAL AS TO ORDER STAYING MANDATE

Thereafter, to wit, on April 27, 1935, mandate was stayed until further order of court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 94] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is

granted, and the case is assigned for argument immediately following No. 25.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,636. U. S. Circuit Court of Appeals, First Circuit. Term No. 83. Norman W. Bingham, Jr., et al., etc., Petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed May 29, 1935. File No. 83 O. T. 1935.

MAY 29 193

FILE COPY

Supreme Court of the United States.

October Term, 1934.

No. [redacted]83

Norman W. Bingham, Jr., et al.,
Executors u/w King Upton,
Petitioners,

v.

United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT OF PETITION.

GEORGE S. FULLER,
Attorney for the Petitioners.

NORMAN W. BINGHAM, JR.,
Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

INDEX.

	Page
Petition	1
Statement of the case	1
Questions presented	7
Reasons	8
Brief in support of petition	11
Opinions of the courts below	11
Jurisdiction	11
Statement of the case	11
Argument	11
I. The decision sought to be reviewed is in direct conflict with Lewellyn v. Frick, 268 U.S. 238	11
II. The decision sought to be reviewed is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of Levy's Estate v. Commissioner, 65 F. (2d) 412	16
III. The decision sought to be reviewed is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of Commissioner v. Wallace, 71 F. (2d) 1002, and the decision of the Circuit Court of Appeals for the Fourth Circuit in Tait v. Safe Deposit and Trust Company of Baltimore, 74 F. (2d) 851	18
IV. The decision sought to be reviewed is of far-reaching and general importance	24
V. The decision sought to be reviewed is inconsistent with the line of reasoning on which this Court based its decision in the case of Chase National Bank v. United States, 278 U.S. 327, upholding the constitutionality of the corresponding provision of the Revenue Act of 1921	27

Page

VI. The fact that this Court, on May 20, 1935 (No. 879), granted certiorari in the case of Helvering v. St. Louis Union Trust Co., 75 F. (2d) 416, should be a sufficient reason for its reviewing the case at bar 29

TABLE OF AUTHORITIES CITED.

Ballard v. Helburn, D.C. W.D. Ky. (May 2, 1933; now pending) 26
Blodgett v. Holden, 275 U.S. 142 15
Bonney v. Commissioner, 29 B.T.A. 45; affirmed (per curiam) by Circuit Court of Appeals for Second Circuit, March 11, 1935 20
Boyden v. Mass. Mutual Life Insurance Co., 153 Mass. 544 3
Chase National Bank v. United States, 278 U.S. 327 6, 10, 14, 27, 28, 29
Commissioner v. Johnson, 51 F. (2d) 1075 27
Commissioner v. Wallace, 71 F. (2d) 1002; certiorari denied, 293 U.S. 600 9, 18, 19, 20, 25
Commissioner v. Wallace, 27 B.T.A. 902 18
Coolidge v. Long, 282 U.S. 582 21
David A. Reed et al., Executors, v. Commissioner, 24 B.T.A. 166 26
Grandin v. Heiner, 286 U.S. 561 15
Haskell v. Equitable Life Insurance Co., 181 Mass. 341 3
Helvering v. Duke, 62 F. (2d) 1057; affirmed (by divided court), 290 U.S. 591 20
Helvering v. St. Louis Union Trust Co., 75 F. (2d) 416; certiorari granted, May 20, 1935 10, 29, 30
Hodgkins v. Commissioner, 44 F. (2d) 43; certiorari denied, 283 U.S. 825 27
Klein v. United States, 283 U.S. 231 6, 19, 20, 21, 29, 30
Levy's Estate v. Commissioner, 65 F. (2d) 412 9, 16, 17

Page

Lewellyn v. Frick, 268 U.S. 238 5, 6, 8, 11, 12, 13, 14, 15, 24
McCaughn v. Cornill, 43 F. (2d) 69; certiorari denied, 283 U.S. 825 27
McCormick v. Burnett, 283 U.S. 784 19, 25
May v. Heiner, 281 U.S. 238 19, 25, 28
Nichols v. Coolidge, 274 U.S. 531 14
Parker et al., Trustees, v. Commissioner, 30 B.T.A. 342 26
Philip W. Blood et al. v. Commissioner, 22 B.T.A. 1000 26
Pingrey v. National Life Insurance Co., 144 Mass. 374 3
Reinecke v. Northern Trust Company, 278 U.S. 339 6, 28
Smietanka v. First Trust & Savings Bank, 257 U.S. 602 13
Tait v. Safe Deposit & Trust Co. of Baltimore, 74 F. (2d) 851 9, 18, 19, 20
Third National Bank and Trust Company of Springfield v. White, 287 U.S. 577 6
Tyler v. Treasurer & Receiver General, 226 Mass. 306 22
Tyler v. United States, 281 U.S. 497 6, 29
Whiteside v. Merchants National Bank, 284 Mass. 165 23
Wuchter v. Pizzuti, 275 U.S. 13 15

Acts of 1894, c. 522 3
C.C.H. 1933, Federal Tax Service, par. 9338 26
General Laws, c. 175, §§ 126, 144 3
Judicial Code, sec. 240 (a), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938 (U.S.C.A. Title 28, §347) 11
Massachusetts Acts of 1887, c. 214, §76 3
Revenue Act of 1918, sec. 402 (f) 5, 7, 8, 9, 10, 12, 13, 14, 15, 17, 24, 25
Revenue Act of 1921, sec. 402 (c) 14, 27
Revenue Act of 1924, sec. 302 (g) 13, 16, 17, 26, 27
Revenue Act of 1924, sec. 302 (h) 17
Revenue Act of 1926, sec. 302 (g) 19, 26

Supreme Court of the United States.

OCTOBER TERM, 1934.

No.

NORMAN W. BINGHAM, JR., ET AL.,
EXECUTORS U/W KING UPTON,
PETITIONERS,
v.
THE UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

This petition by Norman W. Bingham, Jr., Annie D. Upton and George Upton, executors of the last will of King Upton, late of Gloucester, in the District of Massachusetts, respectfully represents:

STATEMENT OF THE CASE.

This is an action begun in the District Court of the United States for the District of Massachusetts to recover a part of the estate tax assessed against and paid by your petitioners in 1922 as executors of the will of King Upton, late of said district, who died on February 27, 1921.

The action involves so much of the estate tax as was based upon the inclusion in the gross estate of the pro-

ceeds ($29,369.86) of seven insurance policies issued on the life of the decedent, which were payable to the decedent's widow and son (R. 8-9), the Government claiming that they were required so to be included by the provisions of the latter part of section 402 (f) of the Revenue Act of 1918. This section provided that the value of the gross estate of the decedent should be determined by including the value at the time of his death of all property—

> "(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000. of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

There were other policies amounting to more than the $40,000 exemption on the life of the decedent as to which no question has been raised, so that the only question before the Court was whether the proceeds of these seven policies ($29,369.86) were required by the statute to be included in the gross estate, and if so, whether the statute as applied to these seven policies was constitutional.

The seven policies in question were all taken out by the decedent prior to 1900. All of these policies had been irrevocably made payable to the wife or son, or had been assigned to the wife, long before the Revenue Act of 1918 had been passed. These seven policies fall into three groups:

1. Four Berkshire policies: These were issued in Massachusetts by the Berkshire Life Insurance Company of that State for $5000 each, originally payable to the estate. None of them contained any reservation to the insured of power to change the beneficiary or to pledge or assign the policies (R. 11-34). Under the law of Massachusetts, these

policies could not be surrendered by the insured without the consent of the beneficiary or assignee. (Massachusetts Acts of 1887, c. 214, §76, Acts of 1894, c. 522, General Laws, c. 175, §§ 126, 144.)

Haskell v. *Equitable Life Insurance Co.*, 181 Mass. 341.

Pingrey v. *National Life Insurance Co.*, 144 Mass. 374.

Boyden v. *Mass. Mutual Life Insurance Co.*, 153 Mass. 544.

On June 30, 1904, when the estate of the insured was still the beneficiary, they were assigned by the insured to the insurance company to secure a loan of $5900, which loan remained unpaid until his death, when it was deducted from the proceeds of the policies. On July 25, 1904, they were irrevocably assigned by the insured to his wife, Annie D. Upton, by an instrument which read as follows, and the decedent thereafter had no control over them:

"The original and duplicate Assignment should be sent to the Home Office of the Company, where date of receipt will be endorsed and record made. The original will be retained on file and the duplicate returned.

Assignment (Ed. 1902. Form E. 1M.)

Policies 35,098, 41,714, 47,954, 47,955. (Original)

In consideration of love, affection, and one dollar, I do hereby assign all my right, title and interest in policies number 35,098, 41,714, 47,954, 47,955 issued by the

BERKSHIRE LIFE INSURANCE COMPANY OF PITTSFIELD, MASS.

insuring the life of King Upton of Salem, Mass. and all additions to said policy, whether now or hereafter

apportioned, (reserving and excepting the right to the assured to apply the cash value of any dividends thereon in payment of premiums hereafter due on said policy) unto my wife, Annie D. Upton, provided she survives me. This assignment is made subject to a previous assignment to the Berkshire Life Ins. Co. dated June 30, 1904.

Dated at Boston, Mass. this 25th day of July, A.D. 1904.

In the presence of /s/ King Upton (Seal)
/s/ Thos. Courtis."

On the back of the assignment:

"35,098
41,714 Received at Home Office
47,954-5

397 /s/ Theo. L. Allen, Sec'y."
(R. 35)

2. *One Connecticut policy:* This was a $5000 policy issued to the insured by the Connecticut Mutual Life Insurance Company in 1883, payable on his death—

"to Annie Upton (the Assured,) wife of the said Insured, for her sole use and benefit, or to her legal representatives, thirty days after due notice and satisfactory evidence of the death of the said Insured while this Contract is in full force and effect shall have been received at said office in Hartford, Conn., and upon surrender and satisfactory release hereof; or if the said Assured die before said Insured, the said sum insured shall be payable as above to his children, or to their guardian, if under age; or, if there be no such children or descendants of such children then living, the said sum insured shall be payable to the

legal representatives of the said Insured; . . ." (R. 43).

No right was reserved to change the beneficiary, and the insured was given no authority to pledge or assign the policy. He had no general power to surrender the policy without the consent of the beneficiary, except that during a period of thirty days at the end of the first ten-year period and for a similar period of thirty days at the end of each five-year period thereafter, he could surrender the policy for its cash surrender value (R. 43). The end of the last five-year period preceding his death was in 1918, and the end of the next five-year period did not arrive until 1923, more than two years after his death.

3. Two Manhattan policies: These were issued to the decedent by the Manhattan Life Insurance Company of New York in 1888, for $5000 each, one payable on his death to "Mrs. Annie D. Upton, his wife, her executors, administrators, or assigns," and the other payable on his death to "his son, George Upton, his executors, administrators or assigns." No right was reserved to change the beneficiary or to pledge or assign the policies nor did the insured have any power or control over the policies or their proceeds (R. 37-39).

The District Court held that the proceeds of none of the seven policies were to be included in the gross estate for the reason that in *Lewellyn* v. *Frick*, 268 U.S. 238, this Court held that section 402 (f) of the Revenue Act of 1918 should not be construed to apply to the proceeds of policies taken out before that Act was passed, at least where, as here, the policies had been irrevocably made payable or assigned to the named beneficiaries before that Act was passed (R. 61-64).

The Circuit Court of Appeals, on March 26, 1935 (R. 83-88), sustained the District Court as to the Manhattan policies, giving as the reason that "the insured had no interest in these policies that could be terminated at his death" (R. 88), so that they are now out of the picture; but it reversed the District Court as to the other policies, holding that their proceeds were properly included in the gross estate (R. 87-88), and it remanded the case to that Court for further proceedings not inconsistent with its opinion (R. 92).

As to the four Berkshire policies, the Circuit Court of Appeals, after pointing out in its opinion that this Court in the *Frick* case held that "the Statute of 1918 was not retroactive and therefore did not apply to policies issued prior to the enactment of the Revenue Acts imposing estate taxes" (R. 85), went on to hold that under the decisions of this Court since the *Frick* case (referring to *Chase National Bank* v. *United States*, 278 U.S. 327; *Reinecke* v. *Northern Trust Company*, 278 U.S. 339; *Tyler* v. *United States*, 281 U.S. 497; *Klein* v. *United States*, 283 U.S. 231; and *Third National Bank and Trust Company of Springfield* v. *White*, 287 U.S. 577), the proceeds of these four policies were taxable for the following reason:

> "The wife of the testator under these policies received by the assignment of these policies only a contingent interest, unless she survived the testator. Not until his death was her interest complete. Therefore, there passed to her at his death an additional interest which accrued while the Act of 1918 was in effect" (R. 87).

As to the Connecticut policy, the Circuit Court of Appeals (Bingham, J., dissenting) held that its proceeds were taxable for the following reasons:

"The beneficiary, under this policy, did not have an absolute right to the proceeds, since it was dependent on her surviving the insured. In case she did not survive him, it was payable to the insured's children, or, if there were no such children or descendants thereof living at his death, *the proceeds were made payable to the legal representative of his estate;* and inasmuch as the testator reserved the right to demand its cash surrender value on the day it became a paid-up policy, and at the end of each five year period thereafter, until his death, he had an interest in the policy; and his wife's absolute right to the proceeds was conditioned, not only on her surviving him, but also on his failing to survive each five year period. It was his death before hers which finally terminated his rights under the policy and rendered the rights of the beneficiary absolute and complete. It is obvious, we think, that the wife's rights under the policy were enlarged by his death" (R. 88). (Italics ours.)

Questions Presented.

1. Is the mere fact that the beneficiary's right to the proceeds of a life insurance policy, payable upon the death of the insured, is contingent upon his surviving the insured sufficient to bring such proceeds within the purview of the insurance provision of the Federal Estate Tax Law, where the beneficiary's rights were irrevocably established before the Revenue Act of 1918 (the first one to contain such insurance provision) and the insured thereafter retained no power or control over the disposition of the policy or its proceeds which could limit or affect the rights of such beneficiary?

2. Does section 402 (f) of the Revenue Act of 1918 apply to the proceeds of insurance policies taken out by the

decedent on his own life and irrevocably assigned by him many years before the enactment of that Act to his wife "provided she survives me," the decedent having thereafter no power or control over the disposition of the policy or its proceeds which could limit or affect the rights of his wife?

3. Does section 402 (f) of the Revenue Act of 1918 apply to the proceeds of an insurance policy taken out by the decedent on his own life many years before the enactment of that Act, payable on his death to his wife, or, if she died before he did, to his children, or, if none were then living, to his estate, where the decedent had no power or control over the disposition of the policy or its proceeds which could limit or affect the rights of his wife, except that at the end of ten years from the date (1883) of the policy, and at the end of each period of five years thereafter, the decedent might surrender the policy for cash within thirty days after the end of each such period, the last of such five-year periods before his death having ended May 22, 1918, and the next one not ending until 1923, more than two years after his death?

4. Does section 402 (f) of the Revenue Act of 1918, as construed and applied by the Circuit Court of Appeals to the five policies now involved in the case at bar, violate the Fifth Amendment of the Constitution of the United States?

Reasons.

1. The decision sought to be reviewed is directly contrary to *Lewellyn* v. *Frick*, 268 U.S. 238, in which this Court squarely held that section 402 (f) of the Revenue Act of 1918 did not apply to the proceeds of insurance policies under such circumstances as existed in the case at bar. The facts in the two cases are indistinguishable (*infra*, pp. 11-16).

2. The decision sought to be reviewed, in holding that the mere fact that the beneficiary's right to the proceeds of a life insurance policy are contingent upon her surviving the insured (the decedent) is sufficient to make such proceeds taxable under the Federal estate tax provisions of the Revenue Acts, is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Levy's Estate* v. *Commissioner*, 65 F. (2d) 412, as to forty-four of the insurance policies there involved (*infra*, pp. 16-17).

3. The decision sought to be reviewed is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Commissioner* v. *Wallace*, 71 F. (2d) 1002 (certiorari denied, 293 U.S. 600), and the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Tait* v. *Safe Deposit & Trust Co. of Baltimore*, 74 F. (2d) 851 (*infra*, pp. 18-23).

4. The decision sought to be reviewed is of far-reaching importance in the field of revenue taxes, for the point on which it turns applies not only to the taxability of insurance proceeds under the Revenue Act of 1918, but also to their taxability under all of the subsequent Revenue Acts. Furthermore, it is contrary to a long line of other decisions of various tribunals in which it has been held that where a grantor has retained no interest in or control over the subject-matter granted—*e.g.*, where the subject-matter granted is a remainder after a reserved life estate, or the proceeds payable at death on a life insurance policy—the fact that the interest of the grantee is contingent upon his survival, or that there is a possibility of reverter to the grantor in case such grantee does not survive, is not sufficient to warrant the inclusion of such property as a part of the gross estate where the grant was made before the passage of the first of the Revenue Acts and the decedent had

no power to revoke or modify or control the property granted (*infra*, pp. 24-27).

5. The decision sought to be reviewed, by construing section 402 (f) of the Revenue Act of 1918 to apply to the five policies now involved, revives the question as to the constitutionality of that section as so applied, and, in holding that the proceeds were taxable notwithstanding that the decedent had irrevocably relinquished control before the 1918 Act was passed, is in conflict with the decision in *Chase National Bank* v. *United States*, 278 U.S. 327 (*infra*, pp. 27-29).

6. The point involved is akin to that involved in the case of *Helvering* v. *St. Louis Union Trust Co.*, 75 F. (2d) 416, in which this Court granted certiorari on May 20, 1935 (No. 879) (*infra*, p. 29).

Wherefore your petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the First Circuit and submit their brief hereto attached in support of this petition.

Respectfully submitted,

GEORGE S. FULLER,

Attorney for Petitioners.

NORMAN W. BINGHAM, JR.,

Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the District of Massachusetts is at R. 61-64, and is reported at 7 F. Supp. 907. The majority and dissenting opinions of the Circuit Court of Appeals for the First Circuit are at R. 83-91, but have not yet been reported.

JURISDICTION.

1. Judicial Code, section 240 (a), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938 (U.S.C.A. Title 28, §347).

2. The date of the judgment to be reviewed is March 26, 1935 (R. 92).

3. The judgment of the Circuit Court of Appeals in substance and effect is a final judgment in that there is left to the District Court nothing but the mere mathematical computation of the amount of tax which had been based on the inclusion of the $10,000 proceeds of the two Manhattan policies.

STATEMENT OF THE CASE.

(See Petition, pp. 1-10, *supra*.)

ARGUMENT.

I.

THE DECISION SOUGHT TO BE REVIEWED IS IN DIRECT CONFLICT WITH LEWELLYN v. FRICK, 268 U.S. 238.

A. The two cases are indistinguishable on the facts (except in a way unfavorable to the Government's posi-

tion, *i.e.*, in the *Frick* case the decedent retained control of some policies, whereas he had no such control in the case at bar).

1. In each case the decedent died during the period covered by the Revenue Act of 1918.

2. In each case the amount of tax sought to be recovered was the amount of the estate tax assessed under the last part of section 402 (f) of that Act with respect to the proceeds, in excess of $40,000, received by his widow or child after his decease from insurance policies taken out by the decedent on his own life.

3. In each case the policies had been made payable or assigned to the beneficiary before that Revenue Act was passed.

4. In each case premiums were paid by the decedent up to the time of his death.

5. Each case involved policies where the proceeds were payable, *or assigned*, to the beneficiary *if he survived* the decedent. (This was so as to all five of the policies now involved in the case at bar, and was so as to *all* but two of the eleven policies involved in the *Frick* case.) (See Appendix to the Briefs in *Frick* case.)

6. The four Berkshire policies in the case at bar were substantially identical with one of the policies involved in the *Frick* case, a policy for $20,000 issued by the same insurance company and payable on the same contingency. The *Frick* case also involved a Connecticut Mutual Life Insurance Company policy which was payable on the same contingency and had the same kind of surrender provisions as in the case of the Connecticut policy in the case at bar.

7. In short, in no material way can the two cases be distinguished on their facts or as to the question involved, except that in the *Frick* case the decedent retained control over some of the policies in that he might revoke

the assignment or otherwise change the beneficiary, whereas *in the case at bar the decedent had no such power or control.*

B. This Court, in the *Frick* case, very definitely held that section 402 (f) of the Revenue Act of 1918 should be construed "as referring only to transactions taking place after it was passed." It is clear from an examination of the facts and opinion in that case that the "transactions" which this Court was talking about were the "transactions" by which the beneficiaries acquired their rights under the policies, *i.e.*, the taking out of the policies payable to a named beneficiary, or the subsequent naming of the beneficiaries or assignments of the policies. In other words, that case very definitely held that that Act did not apply where the interests of the beneficiaries were established before that Act was passed.

C. There were three impelling reasons which led this Court to so construe that Act, each of which, and especially the third one, is equally impelling in the case at bar, as the decedent retained no control over the policies.

1. Such a construction would avoid certain doubts as to its constitutionality.

2. The general principle "that the laws are not to be considered as applying to cases which arose before their passage" was thereby preserved, "when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

3. The fact that the corresponding provision of the Revenue Act of 1924 (section 302 (g)) was expressly made to apply to past transactions indicated that Congress had not intended the earlier Act to so apply; *i.e.*, this Court applied the doctrine of *Smietanka* v. *First Trust & Savings Bank*, 257 U.S. 602.

D. The case of *Chase National Bank et al.* v. *United States,* 278 U.S. 327, on which the Court below so strongly relied, certainly did not cast any doubt on the *Frick* case.

1. The *Chase Bank* case arose under the Revenue Act of 1921 and the question was whether the proceeds of certain insurance policies taken out by the decedent *after* that Act was passed, payable to named beneficiaries, but where the decedent retained the *right to change the beneficiary and other rights of control,* could constitutionally be included in the decedent's estate for the purpose of the estate tax. The statutory provision involved was identical with the statutory provisions involved in the *Frick* case.

2. This Court not only referred to the *Frick* case, but expressly recognized it as establishing that the 1918 Act did *not* apply to policies where the beneficiaries' right had been established before that Act was passed, for it said at page 333, after stating the constitutional question raised in the *Chase Bank* case:

> "Similar questions were mooted by counsel, but not decided, in *Lewellyn* v. *Frick,* 268 U.S. 238, 251."

They were mooted and not decided because the construction adopted by the Court had eliminated any constitutional question.

E. This Court in *Nichols* v. *Coolidge,* 274 U.S. 531, 539, again recognized the *Frick* case as having settled the law as to cases arising under the 1918 Act, saying:

> "Under *Lewellyn* v. *Frick,* 268 U.S. 238, at 251, only such [subsequent] transfers come within Section 402 (f)"—

of the 1918 Act.

F. In the opinion of four of the justices in the cases of *Blodgett* v. *Holden*, 275 U.S. 142, at 148, the *Frick* case is cited in support of the proposition that it is the usual understanding "that statutes direct themselves to future, not to past transactions," and in the dissenting opinion of Mr. Justice Brandeis in *Wuchter* v. *Pizzuti*, 276 U.S. 13, at 27, concurred in by Mr. Justice Holmes, the *Frick* case is cited to the point that "a construction which raises a serious doubt as to the constitutionality of a statute will not be adopted if some other construction is open."

G. Thus it appears that, so far as any utterances by this Court are concerned, the *Frick* case is still recognized as the authority as to the meaning and scope of section 402 (f) of the Revenue Act of 1918, and that that case establishes that, in the case of decedent, who died during the period of the 1918 Act, section 402 (f) does *not* apply to the proceeds of his life insurance policy where the ultimate beneficiary was named or the policy was assigned to such ultimate beneficiary *before* that Act was passed. It is also clear that in reaching that conclusion this Court was not concerned with whether the decedent had retained until his death any power to surrender the policy for cash, or to change the beneficiary, or to revoke the assignment, or any other power of control, or *whether the beneficiary's rights were contingent upon his surviving the decedent.* In all such cases, the beneficiary acquired his rights before that Act was passed, and the statute was held *not* to include *any* of such policies.

H. The situation now before this Court is materially different from the situation which existed when this Court denied certiorari in the case of *Grandin* v. *Heiner*, 286 U.S. 561.

1. There was no decision of any other Circuit Court of Appeals in conflict with the decision sought to be reviewed.

2. The decedent had reserved control over the policies involved in that case, whereas in the case at bar the decedent had no control.

II.

THE DECISION SOUGHT TO BE REVIEWED IS IN DIRECT CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN THE CASE OF LEVY'S ESTATE v. COMMISSIONER, 65 F. (2d) 412.

A. In the *Levy* case, which involved an estate tax and arose under the Revenue Act of 1924 and came up on appeal from the Board of Tax Appeals, the Commissioner of Internal Revenue had included as part of the decedent's gross estate the proceeds of one hundred and ten policies which were payable at his death to named beneficiaries. The decedent had originally reserved the right to change the beneficiary of these policies. On May 1, 1916, the decedent cancelled his right to change the beneficiary as to forty-four of these policies and irrevocably made his wife the beneficiary. It appears, however, that her interest was contingent upon her surviving the decedent, as the mode of settlement then established provided—

> "That settlement of the full proceeds of this policy shall be made with Sally S. Levy, wife and beneficiary, in accordance with the provisions of Option A and *in event of* her death settlement shall be made in the same manner with . . . children, herein designated as 'contingent beneficiaries' . . ."

B. Option A provided that the insurance company was to retain the proceeds until the death of the last surviving beneficiary or contingent beneficiary, the company in the meantime to pay an annuity equal to 3 per cent of the amount

so retained to the widow. Furthermore, the decedent retained the power to change or revoke the designations of the "contingent beneficiaries," but not of the wife.

C. The Circuit Court of Appeals for the Second Circuit held that, as to these forty-four policies, the decedent, having thus irrevocably designated his wife as the beneficiary, no longer had any power, under the law of New York, to surrender, assign or borrow on the policies so as to affect her right to the 3 per cent annuity without her consent, and that therefore the value of that annuity was not to be included in the gross estate under section 302 (g) of the Revenue Act of 1924.

D. That decision, therefore, directly conflicts with the decision in the case at bar in that the wife's interest in the proceeds of the policies was necessarily contingent upon her surviving the decedent (the insured), and notwithstanding that fact that Court held that the value of such interest was not to be included under the corresponding estate tax provision of the Revenue Act of 1924.

E. It affords no ground for distinction that the *Levy* case involved the 1924 Act, while the case at bar involves the 1918 Act, for section 302 (g) of the 1924 Act is identical with section 402 (f) of the 1918 Act.

F. The fact that section 302 (h) of the 1924 Act expressly made section 302 (g) apply to "transfers, trusts, estates, interests, right, powers and relinquishment of powers . . . whether made, created, arising, existing, exercised, or relinquished before or after the enactment" of that Act is of no importance as far as the issue involved here is concerned, to wit, whether the fact that the beneficiary's interest is contingent upon her survival is sufficient to bring the policy within the Act.

III.

THE DECISION SOUGHT TO BE REVIEWED IS IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN THE CASE OF COMMISSIONER v. WALLACE, 71 F. (2d) 1002, AND THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT IN TAIT v. SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, 74 F. (2d) 851.

A. The Circuit Court of Appeals in the case at bar based its decision as to the four Berkshire policies solely on the fact that the assignment of these policies was to the wife "provided she survives me." The Court's reason was stated by it as follows (R. 87):

> "The wife of the testator under these policies received by the assignment of these policies only a contingent interest, unless she survived the testator. Not until his death was her interest therein complete. *Therefore,* there passed to her at his death an additional interest in the proceeds of the policies which accrued while the Act of 1918 was in effect." (Italics ours.)

B. The situation in the *Wallace* case is, we submit, indistinguishable in principle or in any material way. In that case (which arose in the Board of Tax Appeals and the facts as to which appear in 27 B.T.A. 902) a grantor had transferred property in trust to pay the income to the grantor during her life and on her death to pay over the corpus to her daughter "if she be living." If the daughter predeceased the grantor, the property reverted to the grantor. The Board held that the death of the grantor in 1928 was not the generating source of definite accessions to the property rights of the surviving daughter, and that there was no transfer from

the dead to the living upon which to levy an estate tax. This decision of the Board was affirmed without opinion by the Circuit Court of Appeals for the Second Circuit, citing *McCormick* v. *Burnett*, 283 U.S. 784, and *May* v. *Heiner*, 281 U.S. 238. Certiorari was denied by this Court, 293 U.S. 600.

C. In the *Tait* case, which arose under the Revenue Act of 1926, the decedent had created a trust in 1923 to pay the income to himself for life, and upon his death to pay one-half of the corpus to his wife, if then living. One of the questions was whether this one-half of the corpus was to be included in his gross estate as a transfer intended to take effect at his death, the Government contending that the wife's interest prior to her husband's death was purely contingent, since not until then could it be ascertained whether she would survive, and that hence his death was the generating source which brought into being her new and enlarged property right for her enjoyment, claiming that the case was governed by *Klein* v. *United States*, 283 U.S. 231. The Circuit Court of Appeals for the Fourth Circuit rejected this contention, pointing out that the decision in the *Klein* case was based *not* upon the contingent nature of the gift to the wife, but upon the express reservation of title to the corpus in case of her prior death by the grantee.

In the *Klein* case the decedent had made a deed of property to his wife with *two* habendum clauses. By the *first* the lands were to be held by the grantee "for and during the term of her natural life," and the reversion was "expressly reserved to the grantor and excepted from this conveyance." By the second it was provided, "upon condition and in the event" that the grantee survived the grantor, then, "and in that case only," the grantee was to hold the lands in fee. In its opinion this Court said:

". . . The two clauses of the deed are quite distinct—the first conveys a life estate; the second deals with the remainder. . . . It follows that only a life estate immediately was vested. The remainder was retained by the grantor. . . .

"It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the *larger* estate into being for the grantee. . . ." (Italics ours.)

D. The Circuit Court of Appeals in the case at bar expressly relied upon the *Klein* case in reaching its decision (R. 85), and therefore conflicts in principle with the *Wallace* and *Tait* cases and several other similar cases, including *Helvering* v. *Duke,* 62 F. (2d) 1057, affirming 23 B.T.A. 1104 (affirmed by a divided Court, 290 U.S. 591), *Bonney* v. *Commissioner,* 29 B.T.A. 45, affirmed (per curiam) by the Circuit Court of Appeals for the Second Circuit on March 11, 1935, where the Courts have rejected the contention that the *Klein* case controls in a situation such as the *Wallace* case where the beneficiary's interest fails if he or she does not survive.

E. Certainly there can be no valid distinction between the nature of the interest of the wife in the proceeds of the policies in the case at bar and the nature of the interest of the daughter of the decedent in the corpus of the trust fund in the *Wallace* case. The corpus of the trust was to be paid to the daughter on the death of the decedent in the *Wallace* case, "if she be living." The proceeds of the insurance policy in the case at bar were to be paid to the wife "provided she survives me." The situation was equally out of the decedent's control in both cases and the grantor retained nothing in either case. In the one case

the beneficiary's interest was irrevocably established by the trust instrument—a contract between the decedent and the trustee. In the other case the beneficiary's interest was irrevocably established by the assignment filed with the insurance company. In each case the beneficiary's rights had become absolute, subject only to her surviving. In each case the transfer was complete as far as the decedent was concerned when made by him, and he had nothing left but the possibility of a reverter. The situation was in no way parallel to the *Klein* case, for in that case the decedent had made a present transfer to his wife of *only* a life estate, and had expressly reserved the *remainder to himself*.

F. As stated by Mr. Justice Roberts in his dissenting opinion in *Coolidge* v. *Long*, 282 U.S. 582, at 631, concurred in by three other justices and in no way disputed by the majority opinion—

> ". . . The test to be applied in cases arising under the Federal Estate Tax law is whether the transferor has parted with every vestige of control over the beneficial enjoyment and possession of the property, and not *whether the beneficiary has received it.*" (Italics ours.)

The "property" in these insurance-policy cases is the proceeds payable at the death, or the right to such proceeds. The fact that the beneficiary is to receive those proceeds only if he or she survives in no way leaves the insured with any vestige of control. The beneficiary's right becomes irrevocably vested when the policies are made payable to such beneficiary and the insured retains no power to change such beneficiary or to surrender or pledge the policy without the consent of such beneficiary.

1. As stated by the Court in *Tyler* v. *Treasurer & Receiver General,* 226 Mass. 306, at 308-309:

> "The rights of the beneficiary attach at once upon becoming so designated by the terms of the contract. Where the beneficiary is the wife of the insured, her rights instantly vest upon a meritorious consideration. It has been said that, apart from any statutory provision, the designation of a beneficiary in a policy of life insurance is in the nature of an executory trust for his benefit of which he cannot be deprived without his consent. Said Chief Justice Fuller in *Central Bank of Washington* v. *Hume,* 128 U. S. 195, at page 206: 'It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries. . . .' The rights of the beneficiary are vested when the designation is made in accordance with the terms of the contract of insurance. They take complete effect as of that time. They do not wait for their efficacy upon the happening of a future event. . . ."
>
> "Whatever the insured does in way of designation of a beneficiary takes effect forthwith. If his act rightly be describable as a gift, it is a present gift which, so far as concerns him, takes effect at once both in possession and enjoyment by the beneficiary. There is no fund in which he has an ownership which is the subject of his act in designating the beneficiary, as in *New England Trust Co.* v. *Abbott,* 205 Mass. 279, and *State Street Trust Co.* v. *Treasurer & Receiver General,* 209 Mass. 373. The insured has no title to the amount due on the policy. He does not and cannot make a gift of that. The right to that amount as an instant obligation does not spring into existence un-

til after his death. Even then the money belongs to the insurer, who is charged with the duty by the contract to pay to the beneficiary. So far as the insured is a 'grantor,' to use the word of the statute, the only thing which he grants or can grant is an interest in a contract. So far as he can make a 'gift,' the only thing which he has to give is a right in a contract. By designating a beneficiary both the 'grant' and the 'gift,' so far as either exist at all, take effect in enjoyment and possession at once. Such a relation does not by fair intendment come within the descriptive words of the statute as 'property . . . which shall pass . . . by . . . gift . . . made or intended to take effect in possession or enjoyment after the death of the grantor.'"

G. The situation is analogous to that of a trust beneficiary whose interest is dependent upon his surviving. In the case of *Whiteside* v. *Merchants National Bank,* 284 Mass. 165, the remainder of a trust, on the death of the life tenant, was to be divided "between the issue of my children then living." In holding that the interest of such issue in the remainder vested in them as soon as they came into being, subject to the issue surviving the testator, the Court said:

> "The only contingency affecting the right of the [issue] to receive his share is whether he shall be alive when that time arrives. By no other contingency can he be deprived of the certainty of sharing in the fund. He has been ascertained as one of the class who must inevitably take when distribution is made, provided he is then alive. The devise to him took effect as a fixed right which must ultimately ripen into an absolute title unless defeated by his prior death."

IV.

THE DECISION SOUGHT TO BE REVIEWED IS OF FAR-REACHING AND GENERAL IMPORTANCE.

A. If allowed to stand, it strikes at the very root of the long-established principle that decisions of this Court establish the law of the United States as to points involved therein, and if Circuit Courts of Appeal can disregard them with such flagrancy as they have done in the case at bar, the situation is left in a state of chaos.

1. The *Frick* case very plainly held that section 402 (f) of the Revenue Act of 1918 should not be construed to apply to the proceeds of insurance policies where the rights of the beneficiaries had been established before that Act was passed, even though such beneficiaries' rights were contingent upon their surviving the insured. The decision in the case at bar flies directly in the face of the *Frick* case by holding that section 402 (f) of the Revenue Act of 1918 applied to the policies in the case at bar, policies which cannot be distinguished from the policies involved in the *Frick* case.

B. The decision thus establishes a new and, we submit, unthinkable principle that, after this Court has determined that an Act of Congress should be construed so as not to apply to a certain set of facts, a lower court may now determine, several years after this Court's decision, that such construction was erroneous and that that Act *does* apply to an identical set of facts merely because the lower Court apparently feels that this Court would, if the case were now before it for the first time, have reached a conclusion opposite to its original conclusion. Such a proposition possibly might not be such a startling one where the question involved was one of general law, as to which

views sometimes change in the course of years. Where, however, the question is one of statutory construction and this Court has determined that Congress meant a certain thing when it passed such statute, no amount of later change in economic conditions or viewpoints of courts or of Congress can furnish any warrant for now holding that the intention of Congress when it passed that statute several years ago was just the opposite from what this Court has already determined to have been its intent.

C. It is probably true that, in the great majority of cases where the proceeds of policies are made payable to named beneficiaries, such payment is contingent upon the beneficiaries surviving the insured. It is also probably true that in a great many of the pending cases involving the estate tax on such proceeds, the beneficiaries' rights were established before the Revenue Act of 1918 was passed, and that in many of those cases the beneficiaries' interests were beyond the control of the insured. Therefore, the controlling point involved in the case at bar as to the contingency of the beneficiary's interest is of far-reaching importance and ought to be settled by this Court. Furthermore, this case is an ideal one for this Court to review in settling this point, for the decision of the lower Court rested simply and squarely on this point.

D. It is also of far-reaching importance for the reason that it is in conflict in principle, not only with the several cases above referred to (including the *McCormick* case and *May* v. *Heiner*, on which the *Wallace* case rested), but also with a long line of decisions of other Courts or tribunals involving not only insurance policies in substantially the same situation as are the policies in the case at bar, but also transfers in trust where the beneficiary's interest is

contingent upon his surviving, which are, we submit, indistinguishable in any material way, *e.g.:*

Ballard v. *Helburn*, D.C. W.D. Ky. (May 2, 1933) (now pending before the Circuit Court of Appeals for the Sixth Circuit) (unreported officially. See C.C.H. 1933, Federal Tax Service, paragraph 9338).

(Two of the insurance policies were assigned prior to Revenue Acts to wife, *if living*, otherwise to daughter, if living, otherwise, to estate of insured. No power to revoke assignment or change beneficiaries. *Held* contingency of wife's interest not sufficient to bring policies within section 302 (g) of Revenue Act of 1926.)

Parker et al., Trustees, v. *Commissioner,* 30 B.T.A. 342 (pending on appeal before Eighth Circuit).

(Insurance policies taken out in 1903 payable to wife, *if living*, otherwise to the estate. No power to change beneficiary. *Held* not within section 302 (g) of the Revenue Act of 1924.)

Philip W. Blood et al. v. *Commissioner,* 22 B.T.A. 1000.

(Five of the insurance policies were taken out prior to 1915, payable to wife, *if living;* otherwise, to insured's estate. *Held* not within section 302 (g) of Revenue Act of 1924.)

David A. Reed et al., Executors, v. *Commissioner,* 24 B.T.A. 166.

(Three of the insurance policies, taken out prior to 1910, payable to wife, but *contingent upon her survival.* No power to change beneficiary. *Held* not within section 302 (g) of Revenue Act of 1926.)

McCaughn v. *Cornill*, 43 F. (2d) 69 (C.C.A. 3d) (certiorari denied, 283 U.S. 825).

(Trust. Income to grantor for life, then to wife *for life*, and after death of both remainders over. *Held* not within section 302 of Revenue Act of 1924.)

Hodgkins v. *Commissioner*, 44 F. (2d) 43 (C.C.A. 7th) (certiorari denied, 283 U.S. 825).

(Trust. Income to grantor for life, and then to wife, *if she survived*, for life. *Held* not within section 402 (c) of the Revenue Act of 1921.)

Commissioner v. *Johnson*, 51 F. (2d) 1075 (C.C.A. 2d).

(Trust. Income to Alice J. MacBeth during grantor's life. Right reserved, *in event of prior death of Alice J. MacBeth*, to change beneficiary of trust. On death of grantor corpus to be distributed as provided in trust. *Held* not within section 402 (c) of Revenue Act of 1921.)

V.

THE DECISION SOUGHT TO BE REVIEWED IS INCONSISTENT WITH THE LINE OF REASONING ON WHICH THIS COURT BASED ITS DECISION IN THE CASE OF CHASE NATIONAL BANK v. UNITED STATES, 278 U. S. 327, UPHOLDING THE CONSTITUTIONALITY OF THE CORRESPONDING PROVISION OF THE REVENUE ACT OF 1921.

A. This Court made it very clear in that case that the basis for its decision was the principle that "it is the termination of the *power of disposition* of the policies by decedent at death which operates as an effective transfer and

is subjected to the tax'" (italics ours), and the inference is strong that, if the power of disposition of the policies had terminated before the Act was passed, this Court would have held that such a transfer was one which could not have been subjected to the estate tax, as there would not, in such a case, have been any transfer at death, the transfer having taken place when the beneficiary became irrevocably designated.

B. In the case of *Reinecke* v. *Trust Company*, 278 U.S. 339, in referring to the *Chase Bank* case, this Court said (p. 345) that that decision "rested on the ground . . . that a transfer *made subject to a power of revocation in the transferor*, terminable at his death, is not complete until his death." (Italics ours.) In that case this Court also laid it down that if the transfer made or benefit conferred by the decedent was complete when made in his lifetime and *was not thereafter subject to defeasance by any action of his*, there was no constitutional warrant for the imposition of any transfer tax at his death.

C. It may be noted that it was also the fact in the *Chase Bank* case, as appears from the Government's argument (p. 332), that the interest of the beneficiary was contingent upon his surviving, but this Court then appears not to have considered that that fact operated in any way to prevent there being any transfer until the death.

D. In *May* v. *Heiner*, 281 U.S. 238, this Court made it clear that, although the interest of a beneficiary of a trust was contingent upon his surviving, such interest was nevertheless vested in him, and had been transferred to him at the time when it was irrevocably created, and not at the decedent's death.

E. In *Tyler* v. *United States*, 281 U.S. 497, relied upon by the Court below, the basis of the decision was that, up to the date of the death of the husband, he retained a legal and beneficial ownership and interest in the property. No such situation existed, however, in the case at bar. The decedent had no legal or beneficial ownership in the proceeds of the policy after he had irrevocably assigned the policies to his wife. As pointed out by this Court in the *Chase Bank* case, the tax is not on the policies; it is on the transfer of the power of disposition over the proceeds.

F. In the case at bar no "power of disposition" of the policies or their proceeds ever existed in decedent, in the case of the Berkshire policies, after their assignment to Mrs. Upton in 1904, or, in the case of the Connecticut policy, after it was taken out (except the power to surrender it during a thirty-day period at the end of every five-year period, the last of which ended more than two years before his death). Nothing but the beneficiary's prior death could have defeated her vested right to the proceeds of the policies. She was the irrevocable beneficiary of the policies.

VI.

THE FACT THAT THIS COURT, ON MAY 20, 1935 (NO. 879), GRANTED CERTIORARI IN THE CASE OF HELVERING v. ST. LOUIS UNION TRUST CO., 75 F. (2d) 416, SHOULD BE A SUFFICIENT REASON FOR ITS REVIEWING THE CASE AT BAR.

A. The points involved in the two cases are akin to each other. In both cases the Government relied primarily on the case of *Klein* v. *United States*, 283 U.S. 231. In the case at bar the Circuit Court of Appeals decided in favor of the Government, relying largely on the *Klein*

case. In the *St. Louis Union Trust* case, the Court overruled the Government's contention as to the *Klein* case and held that the fact that the beneficiary's interest was contingent on his surviving the decedent was not sufficient to render that interest subject to the estate tax.

Respectfully submitted,

GEORGE S. FULLER,

Attorney for the Petitioners.

NORMAN W. BINGHAM, JR.,

Of Counsel.

FILE COPY

Office Supreme Court
NOV 8 1
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1935.

No. 83.

NORMAN W. BINGHAM, Jr., ET AL.,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONERS.

GEORGE S. FULLER,
Attorney for the Petitioners.

L. H. Lane, Law Printer, 221 High Street, Boston.

TABLE OF CONTENTS.

	Page
Opinions Below	1
Jurisdiction	1
The Question Presented	2
Statement of the Case	2
Four Berkshire Policies	3
The Connecticut Policy	5
The Questions	6
The Statute Involved	6
I. The Case of Lewellyn v. Frick, 268 U. S. 238, is Controlling	7
A. The Issues and Facts Involved in the Frick Case are Indistinguishable from Those in the Case at Bar	7
B. The Frick case established the proposition, in no doubtful terms, that § 402 (f) of the 1918 Act should not be construed to apply to insurance policies, the proceeds of which were receivable by beneficiaries other than the estate, where such beneficiaries' rights were created before that Act was passed	10
C. The decision in the Frick case has never been questioned by the Supreme Court but, on the contrary, has been several times recognized by it as having settled the question as to the construction to be given to the 1918 Act	19
D. The fact that the assignment of the Berkshire policies was to the wife "provided she survives me", and that the Connecticut policy was payable to the wife or, if she died before the insured, to his children, or, if no such children or descendants of such children then living, to the insured's estate, furnishes no warrant for the inclusion of such policies	22
II. If, Notwithstanding the Frick Case and the Cases Above Referred to, this Court Feels that we Get to the Consti-	

Page

tutional Point, we Submit that, Inasmuch as the Decedent Retained no Control Over the Policies or their Proceeds, and as the Rights of the Beneficiaries were Beyond the Control of the Decedent Before the 1918 Act was Passed, the Constitutional Point is Already Settled Against the Government by the Case of Nichols v. Coolidge, 274 U. S. 531 31

III. Conclusion 35

TABLE OF AUTHORITIES AND CASES CITED.

Blodgett v. Holden, 275 U. S. 142, 148 19

Boyden v. Massachusetts Mutual Life Insurance Company, 153 Mass. 544 5

29 B. T. A., 1306 at 1311 24

1935 C. C. H. Fed. Tax Service, Par. 9543 24

Chase National Bank v. United States, 278 U. S. 327, 333, 19, 21, 28, 34

Coolidge v. Long, 282 U. S. 582 . . . . . 31, 32, 33

General Laws, Chapter 175, Sections 126, 144 . . 5

Gwinn v. Commissioner, 287 U. S. 224, 229 33

Haskell v. Equitable Life Insurance Company, 181 Mass. 341 5

Heiner v. Grandin, 44 F. (2) 141 20

Helvering v. Duke, 290 U. S. 591 28

Helvering v. Grinnell, 294 U. S. 153 . . . . . 21, 28

Helvering v. St. Louis Union Trust Co., 75 F. (2d) 416 . 27

Industrial Trust Company v. United States . . . 24

Judicial Code, Section 240 (a) as amended by Act of February 13, 1925 1

Levy's Estate v. Commissioner, 65 F. (2) 412 . . . 22, 23

Lewellyn v. Frick, 268 U. S. 238 . . 3, 7, 10, 20, 34, 35

Liebes v. Commissioner, 63 F. (2) 870 20

Page

Massachusetts Acts of 1887, Chapter 214, Section 76 . 5
Acts of 1894, Chapter 522 . . . 5
May v. Heiner, 281 U. S. 238 . . 25, 26, 28, 30, 34, 35
McCormick v. Burnet, 283 U. S. 784 . 25, 26, 27, 28, 30, 35
Nichols v. Bradley, 27 F. (2) 47 29
Nichols v. Coolidge, 274 U. S. 531, 539 . 19, 31, 33, 34
Pingrey v. National Life Insurance Company, 144 Mass. 374, 5
Revenue Act of 1918, Sec. 401 7
Sec. 402 (c) . 18, 25, 26, 27, 28, 33, 35
Sec. 402 (f) 2, 6, 7, 10, 16, 18, 19, 26, 27, 33, 35
Revenue Act of 1924, Sec. 302 (g) 22
Saltonstall v. Saltonstall, 276 U. S. 260 . . . . 21, 29
Sampson v. United States, 1 Fed. Supp. 95 . . . 34
Sargent v. White, 50 F (2) 410 29
Schwab v. Doyle, 258 U. S. 529, 534 25
Scott v. Commissioner, 69 F. (2) 444 21
The Pennsylvania Company for Insurance on Lives and Granting Annuities v. Commissioner 24
Third National Bank v. White, 287 U. S. 577 . . . 33
Tyler v. Treasurer and Receiver General, 226 Mass. 306 . 17
Tyler v. United States, 281 U. S. 497 . . 21, 27, 28, 32
Wallace v. Commissioner, 27 B. T. A. 902 . . . 28, 30
Wuchter v. Pizzutti, 276 U. S. 13, 27 19

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1935.

No. 83.

NORMAN W. BINGHAM, JR., ET AL.,
PETITIONERS,
v.
THE UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Massachusetts (R. 61) is reported in 7 Fed. Supp. 907. The opinion of the Circuit Court of Appeals (R. 83) is reported in 76 Fed. (2) 573.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 26, 1935 (R. 92). The petition for a writ of certiorari was filed May 29, 1935 and was granted October 14, 1935. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED.

This case raises the question as to whether the proceeds of certain life insurance policies taken out by a decedent on his own life, which, long before 1918, were assigned or made payable to named beneficiaries other than his estate, with no power reserved to the decedent to revoke the assignment or change the beneficiary, were subject to tax under the insurance clause (§ 402 (f)) of the Estate Tax provisions of the Revenue Act of 1918.

STATEMENT OF THE CASE.

The facts were stipulated (R. 7) and may be summarized as follows:

The petitioners are the Executors under the will of King Upton, late of Massachusetts, who died on February 27, 1921, during the period covered by the Revenue Act of 1918. (The Revenue Act of 1921 was not enacted until 1922.)

At the time of the decedent's death, there were seventeen policies of life insurance payable to beneficiaries other than his estate, the proceeds of which amounted to $88,284.96. After deducting the specific exemption of $40,000, the balance, $48,284.96, was included in the decedent's gross estate for the purpose of the Federal Estate Tax. The proceeds of ten of these policies amounted to $58,950.14 and no question is raised as to the propriety of such inclusion under Section 402 (f) of the Revenue Act of 1918.

The proceeds of the other seven policies, some of which were payable to the widow and some to the son of the decedent, amounted to $29,369.86. The action in the District Court was to recover the amount of tax

paid on account of the inclusion of these proceeds as part of the decedent's estate.

The District Court held that all of the seven policies fell within the case of *Lewellyn* v. *Frick*, 268 U. S. 238, and that, therefore, none of the proceeds should have been included within the gross estate of the decedent and entered judgment for the taxpayers accordingly.

The Circuit Court of Appeals for the First Circuit sustained the judgment of the District Court as to two of the policies, and no question has been raised by the Government as to those two policies.* That Court reversed the District Court, however, as to the other five policies.

The essential facts as to these five policies are as follows:

FOUR BERKSHIRE POLICIES.

These were issued in 1891–1895 in Massachusetts to the decedent, who was also of Massachusetts, by the Berkshire Life Insurance Company of that state, for $5,000 each, originally payable to his estate. On June 30, 1904, he assigned the four policies to the insurance company to secure a loan of $5900, which loan remained unpaid until his death, when it was deducted from the proceeds of the policies, making their net proceeds $14,334.49. On July 25, 1904, he assigned the four poli-

* Note.—These were for $5,000 each, issued by the Manhattan Life Insurance Company, of New York, payable on the decedent's death,—one "to his son, George Upton, his executors, administrators or assigns;" and the other "to Mrs. Annie D. Upton, his wife, her executors, administrators or assigns." No right was reserved to change the beneficiary or to assign or pledge the policies, nor did they contain any cash surrender value provisions. The Court below excluded the proceeds of these policies from the gross estate, because the beneficiaries had been irrevocably designated (R. 88). The Government is not seeking review as to these two policies.

cies to his wife, Annie D. Upton. The assignment, which was on one of the Company's printed forms the original of which was filed with the Company, read as follows (see R. 35):

> "The original and duplicate Assignment should be sent to the Home Office of the Company, where date of receipt will be endorsed and record made. The original will be retained on file and the duplicate returned.
> Assignment (Ed. 1902. Form E. 1M.)
> Policies 35,098, 41,714, 47,954, 47,955. (Original)
> In consideration of love, affection, and one dollar, I do hereby assign all my right, title and interest in policies number 35,098, 41,714, 47,954, 47,955 issued by the
>
> BERKSHIRE LIFE INSURANCE COMPANY OF PITTSFIELD, MASS.
>
> insuring the life of King Upton of Salem, Mass. and all additions to said policy, whether now or hereafter apportioned, (reserving and excepting the right to the assured to apply the cash value of any dividends thereon in payment of premiums hereafter due on said policy) unto my wife, Annie D. Upton, provided she survives me. This assignment is made subject to a previous assignment to the Berkeshire Life Ins. Co. dated June 30, 1904.
> Dated at Boston, Mass. this 25th day of July, A. D. 1904.
> In the presence of /s/ KING UPTON (Seal)
> /s/ Thos. Courtis."

On the back of the assignment:

> "35,098
> 41,714 Received at Home Office
> 47,954-5
> 397 /s/ THEO. L. ALLEN, Sec'y."
> (R. 35)

None of these four policies contained any reservation to the insured of a power to change the beneficiary or

to pledge or assign the policies, nor did the decedent reserve any power to revoke the assignment to his wife. Under the law of Massachusetts, these policies could not be surrendered by the insured without the consent of the beneficiary or assignee (Massachusetts Acts of 1887, Chapter 214, Section 76; Acts of 1894, Chapter 522; General Laws, Chapter 175, Sections 126, 144), *Haskell* v. *Equitable Life Insurance Company,* 181 Mass. 341; *Pingrey* v. *National Life Insurance Company,* 144 Mass. 374; *Boyden* v. *Massachusetts Mutual Life Insurance Company,* 153 Mass. 544.*

No change in the situation was thereafter made, and the proceeds of the four policies, after deducting the amount due on the loan, were paid by the Insurance Company to the assignee, said Annie D. Upton, shortly after the decedent's death (R. 15, 21, 27, 33).

THE CONNECTICUT POLICY.

This policy (R. 43, 45) for $5000 was taken out by the decedent in 1883 in the Connecticut Mutual Life Insurance Company, a Connecticut company. It was a ten payment life policy and became a paid-up policy on May 22, 1893, *i. e.* upon the payment of ten annual premiums during the ten year period beginning May 22, 1883.

Under the terms of the policy, the proceeds were pay-

* The Massachusetts statutes specifically provide that "no surrender of a policy shall be made without the written assent of the person to whom the policy is made payable," and that every policy payable to a married woman, "or after its issue assigned, transferred or in any way made payable to a married woman," shall inure to her separate use and benefit. In *Haskell* v. *Equitable Life Assurance Society,* 181 Mass. 341, the policy was payable to the wife, or if she were not then living, to the insured's estate, and it was *held* that, notwithstanding the nature of the wife's right, the insured could not surrender the policy without her consent.

able "to Annie Upton (the Assured), wife of the said Insured [King Upton, the decedent], for her sole use and benefit, or to her legal representatives, . . . or if the said Assured die before said Insured, the said sum insured shall be payable as above to his children, or to their guardian, if under age; or if there be no such children or descendants of such children then living, the said sum insured shall be payable to the legal representatives of the said Insured; . . ."

No right was reserved by the Insured to change the beneficiary or to assign or pledge the policy.

The policy also contained a provision to the effect that during the thirty day period immediately following the end of ten years from the date of the policy, or during such period immediately following the end of each five years thereafter, the Insured might surrender the policy for cash. The end of the last five year period prior to the Insured's death came on May 22, 1918, and the end of the next five year period did not come until May 22, 1923, over two years after the decedent's death. The Company had no other right to accept a surrender and discharge of the policy except when made by *both* the Assured (Annie Upton) and "the payee of the cash value" (the Insured), King Upton.

THE QUESTIONS.

First: Whether Section 402 (f) of the Revenue Act of 1918 should be construed to apply to the proceeds of policies receivable by a beneficiary other than the Estate, where the policies had been taken out and made payable or assigned to the beneficiaries before the passage of that Act?

Second: If so construed and applied, was Section 402 (f) of the Revenue Act of 1918 constitutional?

THE STATUTE INVOLVED.

The pertinent provisions of the Revenue Act of 1918 are as follows:

> "Sec. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States:"
>
> "Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> . . . . . .
>
> (f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

I.

THE CASE OF LEWELLYN v. FRICK, 268 U. S. 238, IS CONTROLLING.

A. The Issues and Facts Involved in the Frick Case are Indistinguishable from Those in the Case at Bar.

The questions before the Court in the *Frick* case were identical with the questions before the Court in the case at bar, *i. e.*, whether Section 402(f) of the Revenue Act of 1918 should be construed to apply to the proceeds

of the policies under consideration, where the policies had been taken out and assigned or made payable to the beneficiaries before the passage of the 1918 Act; and if so construed and applied, was that section constitutional.

The facts as to the policies involved in the two cases are indistinguishable. In each case the policies involved were taken out and assigned or made payable to the beneficiaries *before* the 1918 Act was passed, and the decedent continued to pay the premiums. In nine out of the eleven policies involved in the *Frick* case, the language of the policies as to the interest of the beneficiary, like in the case at bar, was such that if the beneficiary did not survive Mr. Frick, the proceeds were payable on Mr. Frick's death to his estate,* *e. g.*

Berkshire—$20,000—to the daughter "if she survives me; otherwise" to the estate.

Connecticut Mutual—$50,000—to daughter "except that if I shall survive such assignee, all right, etc. shall revert to me."

Equitable Life—($114,000)—"to (wife) if living, if ($50,000) not, then to" Mr. Frick, his executors, etc.

Mutual Benefit—$10,000—"to (daughter) in case she survives the insured. Otherwise" to the estate.

Nederland—$20,000—"to (daughter), or if she shall not then be living, to" the estate.

State Mutual—$20,000—to daughter "but only in the event of the decease of the said insured prior to that of said beneficiary; with the

* Note.—All the material facts as to each of the policies involved in the *Frick* case are set forth in the stipulation as to Facts in the Transcript of Record, and in the Appendices to the Government's and the Frick Estate's briefs, in this Court, reference to which is hereby made.

express provision that if the said insured shall survive the said beneficiary, . . . then this policy and all rights thereunder shall revert to said insured."

New York Life—$65,000)—to daughter "provided
$25,000)
that in the event of the prior death of the said (daughter) this assignment is null and void and of no effect."

The Berkshire policy referred to above was taken out in the same Berkshire Company which issued the four Berkshire policies in the case at bar. This policy was *assigned* by Mr. Frick in 1917 to his daughter, the language of such assignment being that he assigned it to her "if she survives me, otherwise" to his estate. *The situation as to this policy, therefore, is identical to the situation as to the four Berkshire policies in the case at bar.*

The Connecticut policy referred to above was taken out by Mr. Frick in 1890 in the same Connecticut Company which issued the Connecticut policy in the case at bar. This policy contained the *same kind* of *limited cash surrender value* provisions as were contained in the Connecticut policy in the case at bar. In 1917, Mr. Frick assigned this policy to his daughter, "except that if I shall survive such assignee, all right, title and interest therein shall revert to me". *Therefore, the situation as to this policy differed in no material respect from the situation as to the Connecticut policy in the case at bar.*

In the case of five of those nine policies in the *Frick* case, the decedent had one or more of the following powers, to wit:—

To revoke the assignment;
To change the beneficiary;
To surrender the policy for cash;
To pledge it for loans.

None of those situations existed as to any of the policies in the case at bar. Therefore, if none of those five policies in the *Frick* case came within Section 402 (f) of the 1918 Act, as held by this Court, *a fortiori,* none of the policies in the case at bar come within that Act.

B. The Frick case established the proposition, in no doubtful terms, that § 402 (f) of the 1918 Act should not be construed to apply to insurance policies, the proceeds of which were receivable by beneficiaries other than the estate, where such beneficiaries' rights were created before that Act was passed.

Inasmuch, however, as the question is now before this Court again, and as the Government appears to consider that the *Frick* case is no longer controlling as to the various kinds of policies which were involved in that case, we deem it worth while to refer briefly to some of the points made by the Frick Estate in its brief before this Court. We do this for three reasons: *First,* because it makes it absolutely clear that this Court's decision was made after its attention had been called to the various differences between the policies and must, therefore, be deemed to have been intended to apply to every kind of policy there involved, *notwithstanding* such differences; *second,* because, if this Court deem the question still open, the taxpayers in the case at bar adopt the same arguments and insist that they are just as valid and conclusive now as they were then; and *third,* because it will become immediately apparent after

examining the opinion of this Court and the Frick Estate's brief, that *this Court adopted substantially the same line of reasoning* in reaching the same conclusion, to wit, that Section 402 (f) of the 1918 Act was not intended to apply to any of the policies there involved, policies which are indistinguishable from those in the case at bar.

After referring to the summary in the appendix to its brief for a description of the various policies, it pointed out that they fell into four classes (F. Brief, 15–16):

1. Policies originally taken out in the name of the beneficiary with no power to change the beneficiary.
2. Policies originally payable to the estate, with no provision for change of beneficiary, but which were subsequently assigned by Mr. Frick *to his wife, or, if she did not survive him,* to his estate, without reserving power to revoke the assignments.
3. Policies which were assigned with powers reserved to revoke the assignments.
4. Policies which were originally payable to the Executors and which subsequently, by arrangement with the Company, he made payable to his daughter as beneficiary without power to change the beneficiary.

It then pointed out that an attempt had been made in the Court below to point out some differences as affecting ownership of these policies because *some of them contained certain options which Mr. Frick might have exercised,* and because when he assigned some of them *he reserved in the assignments certain powers;* and it argued that so long as Mr. Frick did not exercise any of these options or powers, the contracts were not affected by them. (F. Brief, 17.) (This

is important because it shows not only that this point was called to the Court's attention, but also that it must have considered that the fact that Mr. Frick had such options or powers did not affect its ultimate conclusion that the 1918 Act was not intended to apply *even to such policies*. *A fortiori*, then, the point now pressed by the Government in the case at bar as to the beneficiary's losing his or her right to the proceeds in case he or she did not survive the insured, could not have been deemed to have been material and would not have affected this Court's conclusion. Certainly, if Congress did not intend the 1918 Act to apply to policies where the insured had power to revoke the assignment or change the beneficiary, *a fortiori* Congress did not intend that Act to apply where the insured had no such power *and had only the possibility of having the proceeds payable to his estate in case the beneficiary did not survive him!)*

It then referred particularly to the Equitable Life policy, pointing out that that Company had agreed "to pay Mrs. Frick $114,000 at Mr. Frick's death, *if she were then living,* and if not" to his estate (F. Brief, 18); and it referred again to its proposition that the Government could not distinguish in the matter of ownership between this policy and some of the others which gave Mr. Frick certain powers, such as the power to surrender the policy for cash or where he had reserved power to revoke the assignments or power to change the beneficiary, without having exercised such powers. (F. Brief, 20.)

Again, at F. Brief, 28–29, it referred to the attempt in the Court below to show that the existence of these powers prevented the "estate" from vesting in the beneficiary, and then went on to say:

> "We are at a loss to see what application this contention has to the case; for it is the estate of the beneficiary that is being taxed here. That estate, whether you call it vested or contingent, came into

being when the contract creating the obligation to pay the policy to the beneficiary was made, and continued unmodified by the exercise of options or powers right down to the death of the insured, when the policy became payable at once to the owner of the estate. It is perfectly clear that Mr. Frick's so-called rights were not 'conditions of the vesting of the estate' (if we must use this inaccurate expression), but were simply conditional limitations."

Also, at F. Brief, 30, it pointed out that Mrs. Frick's right (estate) became her property (vested) when the policy was issued or the assignment thereof was made, and could only be divested by a subsequent event which never happened; and then it argued that the existence of such unexercised power in a donor does not subject the property given to taxation as part of his estate. (There is nothing in the *Chase Bank* case to indicate that this line of argument was no longer valid when the question was merely as to whether Congress intended that Section 402 (f) of the 1918 Act apply to such policies where they had been taken out and assigned or the beneficiaries part of his estate. ~~(There is nothing~~ In the *Chase Bank* case, the policies had been taken out *after* the Act there involved had been passed, and the question was as to the *power* of Congress as to such a policy, it being clear that the Act was intended to apply to all policies taken out *after* that Act.)

It was further argued that Section 402 (f) was not retroactive (F. Brief, 33); that the cases of *Schwab* v. *Doyle; Union Trust Co.* v. *Wardell; Levy* v. *Wardell;* and *Knox* v. *McElligott,* 258 U. S. 529 ff., were identical with one another and with the *Frick* case with respect to retroactivity (F. Brief, 35); and that the language construed in *Levy* v. *Wardell* (§ 202 (b) of the 1916 Act), imposing a tax on property "to the extent of the interest therein of which the decedent

has *at any time* made a transfer", gave much more basis for saying that a retroactive effect was intended than did that used in Section 402 (f) of the 1918 Act, and yet it was held not to apply to transfers made before the 1916 Act was passed. (F. Brief, 38.)

Until the 1918 Act, none of the subdivisions of Section 402 had been expressly retroactive, but in that Act, realizing that the provisions of subdivision (c) relating to transfers made in contemplation of death did not cover transfers completed before that Act, Congress inserted the words, "whether such transfer or trust is made or created before or after the passage of this Act". *The significant thing* is that Congress, although its attention was specifically directed to the fact that none of the provisions of Section 402 as they then read were applicable to past transactions, *chose to make them so only* as to transfers within subdivision (c). That, in itself, amounted to a legislative declaration that the other provisions were not intended to be retroactive in their operation in the Act of 1916, nor, *a fortiori,* in the 1918 Act, in which the provision as to insurance policies was first inserted. (F. Brief, 39.)

Exactly such a construction was adopted by this Court in *Knox* v. *McElligott,* 258 U. S. 546, a case of a joint estate, and involving Section 202 (c) of the 1916 Act as amended in 1917. The history of that provision was exactly parallel to that of the insurance tax provision. Subdivision (c) covered interests "held" jointly, or "deposited" in joint names. § 402 (f) of the 1918 Act covered proceeds of policies "taken out" by the decedent upon his own life. A closer parallel of grammatical construction could scarcely be imagined. The *Knox* case held that the language quoted did *not* cover joint estates created before the 1916 Act. (F. Brief, 40.)

The Government's position would require Section 402 (f) of the 1918 Act to be construed as though there had been added at the end of it the words,

"whether such policies were taken out before or after the passage of the Act". (F. Brief, 42.)

The fact that in the 1924 Act Congress added an express provision making the insurance clause apply to policies taken out before the Act (see § 302 (h) of the 1924 Act, expressly applying to subdivision (f), the insurance clause, of that section) showed that Congress recognized that the insurance clause in the previous Act had not so applied. (F. Brief, 42.) Citing *Schwab* v. *Doyle*, 258 U. S. 529; *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602; *United States* v. *Field*, 255 U. S. 257.

A further cogent reason why Section 402 (f) of the 1918 Act should not be construed to apply to the proceeds of policies taken out or assigned from two to thirty-five years before its enactment, rests on the fact that the contrary construction insisted upon by the Government was open to a number of serious constitutional objections. (F. Brief, 44–45.)

And finally at F. Brief, 45–46, it was argued:

> "The language of subdivision (f) of Section 402, under which this tax was collected, does not in terms include the proceeds of the policies in question. It is not to be construed retroactively in the absence of unequivocal language compelling that construction. If ambiguous, it is to be construed in favor of the taxpayer, and so as to avoid the grave constitutional difficulties which inhere in the Government's position. By all the canons of construction, and in the light of the prior and subsequent legislative history of this and its companion provision, it must inevitably follow, on the authority of the cases decided by this Court, that Congress did not intend by the provision in question to impose an estate tax retroactively upon policies of insurance taken out and assigned at a time long prior to the enactment of the taxing Act."

It was also argued that the Act was unconstitutional in that the amount of tax which the beneficiary of an insurance policy would be required to pay would vary according to the amount of the rest of the decedent's estate, and also in that it required Mr. Frick's estate to pay a tax on account of property which he did not transfer. The payments made to the beneficiaries by the insurance company were never the property of Mr. Frick. He merely paid the premiums for a contract on the part of the insurance company to make a payment to his beneficiary at his death.

It is in the light of such arguments on the part of the Frick Estate that the opinion of this Court must be read, and we particularly refer to the last paragraph of that opinion which we here quote for convenience, for we believe it will now take added significance and make it perfectly clear that this Court there definitely declared, and intended to declare, that Section 402 (f) of the 1918 Act should be construed so as not to apply to any of the policies there involved or such as are involved in the case at bar:

> "We do not propose to discuss the limits of the powers of Congress in cases like the present. It is enough to point out that at least there would be a very serious question to be answered before Mrs. Frick and Miss Frick could be made to pay a tax on the transfer of his estate by Mr. Frick. There would be another if the provisions for the liability of beneficiaries were held to be separable and it was proposed to make the estate pay a transfer tax for property that Mr. Frick did not transfer. Acts of Congress are to be construed if possible in such a way as to avoid grave doubts of this kind. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, 390. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle "that the

laws are not to be considered as applying to cases which arose before their passage" is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways. *Schwab* v. *Doyle*, 258 U. S. 529, 534. This case and the following ones, *Union Trust Co.* v. *Wardell*, 258 U. S. 537, *Levy* v. *Wardell*, 258 U. S. 542, and *Knox* v. *McElligott*, 258 U. S. 546, go far toward deciding the one now before us. They also indicate that the Revenue Act of 1924, c. 2, § 302(h); 43 Stat. 250, 305, making (g) (the equivalent of (f) above) apply to past transactions, does not help but if anything hinders the Collector's construction of the present law. *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602."

It must be remembered, particularly in applying the long and well established principle that statutes should be so construed as to avoid grave doubts as to the constitutionality, that in construing the insurance clause of the 1918 Act, it must be looked at in the light of the condition of the law *at that time*. One of the leading cases in the United States which was looked to as determining the nature and effect of a life insurance policy from the point of view of death taxes on its proceeds was *Tyler* v. *Treasurer and Receiver General*, 226 Mass. 306, which held that the rights of the beneficiary attach at once upon her being named, and vest instantly upon a meritorious consideration, and take complete effect as of that time; *that they do not wait for their efficacy upon the happening of a future event;* that the insured retains no ownership of that which has passed to the beneficiary under the contract; *that whatever the insured does in way of designation of a beneficiary takes effect forthwith;* and that, by designating a beneficiary,

both the grant and gift take effect in possession and enjoyment at once. Similar results had been reached by the Courts of other states. Certainly, then, in view of such a state of the decisions, it was *in fact* a matter of grave doubt whether Section 402 (f) of the 1918 Act would be constitutional if applied to such policies as we have in the case at bar, and a construction which would avoid that doubt was required. *Furthermore,* the very fact that Congress inserted a retroactive provision in Section 402 (c) in the 1918 Act and did not insert it in Section 402 (f) furnishes a definitive indication that Congress had that grave doubt in mind at that time.

The fact that in 1929, about five years after the *Frick* case, and about eleven years after the 1918 Act, this Court used language in the *Chase Bank* case which, although the policy there involved was taken out after the Act in question (the 1921 Act) was passed, might be construed to apply also to policies taken out before the Act was passed *where the decedent had reserved the power to control the policies,* surely cannot be said to furnish any warrant for now holding that the intent of Congress in Section 402 (f) of the 1918 Act must be determined in the light of that 1929 decision and other later decisions, or that the *Frick* case was in effect overruled as to *any* of the kinds of policies which it involved where the 1918 Act is involved.

C. The decision in the Frick case has never been questioned by the Supreme Court but, on the contrary, has been several times recognized by it as having settled the question as to the construction to be given to the 1918 Act.

In *Nichols* v. *Coolidge,* 274 U. S. 531, at 539, the majority of the Court says as to this case:

> "Under *Lewellyn* v. *Frick,* 268 U. S. 238, at 251, only such (subsequent) transfers come within § 402 (f)" (of the 1918 Act).

That is a definite reaffirmance by that Court that § 402 (f), the section on which the Government is relying in the case at bar, is *not* to be construed as applying to policies where the rights of the beneficiaries are established before the 1918 Act was passed,—at least where such rights are established beyond the control of the decedent.

In *Blodgett* v. *Holden,* 275 U. S. 142, at 148, in the opinion of Mr. Justice Holmes, in which Justices Brandeis, Sanford, and Stone concurred, the *Frick* case is cited in support of the proposition that it is the usual understanding "that statutes direct themselves to future, not to past transactions".

In *Wuchter* v. *Pizzutti,* 276 U. S. 13, at 27, in the dissenting opinion of Mr. Justice Brandeis, in which Mr. Justice Holmes concurred, the *Frick* case is cited to the point that "a construction which raises a serious doubt as to the constitutionality of a statute will not be adopted if some other construction is open".

And finally, in *Chase National Bank* v. *United States,* 278 U. S. 327, at 333, the Court, after stating the constitutional questions raised in the case then before it (the *Chase Bank* case), says:

"Similar questions were mooted by counsel, but not decided, in *Lewellyn* v. *Frick*, 268 U. S. 238, 251."

It thus appears that the Court in the Chase case expressly recognizes the *Frick* case, and that the decision was such that the constitutional question was avoided. But as the only way the Court could possibly have avoided deciding a constitutional question in the *Frick* case was by deciding that the 1918 Act did not apply to such policies as were involved in that case, it must follow, as a necessary conclusion, that the *Frick* case was good law on the only point decided by it, to wit: the point as to how the 1918 Act should be construed.

Furthermore, it must also be noted that Mr. Justice Holmes, who had written the opinion of the Court in the *Frick* case, apparently was in full accord with the decision and opinion of the Court (written by Mr. Justice Stone) in the *Chase Bank* case, and it is hardly conceivable, therefore, that anything said or decided in the *Chase Bank* case was intended to overrule or cast a doubt upon the decision in the *Frick* case, especially when expressly referring to the *Frick* case.

Whatever doubts have sprung up as to the *Frick* case being still the law as to the non-application of Section 402 (f) of the 1918 Act to such policies as are involved in the case at bar, appear only in lower court decisions, such as *Heiner* v. *Grandin*, 44 F. (2) 141 (3d C. C. A.), and *Liebes* v. *Commissioner*, 63 F. (2) 870 (9th C. C. A.). Such doubts appear, however, to be based upon the Court's failure to appreciate the difference between the principles and questions involved in cases such as the *Frick* case which dealt only with the meaning and

application of statutory provisions, and those involved in cases such as the *Chase Bank* case; *Saltonstall* v. *Saltonstall*, 276 U.S. 260; *Tyler* v. *United States*, 281 U.S. 497; and similar cases in which this Court was not concerned with the meaning or application of the Act but only with questions as to the *power* of Congress,—questions as to constitutional validity of the Act. (See *Helvering* v. *Grinnell*, 294 U.S. 153.)

Furthermore, neither the *Grandin* case nor the *Liebes* case can fairly be said to cast any doubt as to applicability of the *Frick* case to such policies as we have in the case at bar. In both of those cases, the decedent had retained control over the policies and the disposition of their proceeds, and it was only on that ground that those courts, erroneously we believe, held the proceeds of the policies were taxable under the 1918 Act, notwithstanding the *Frick* case. In the case at bar, however, the decedent had retained no such control over, and had none of the incidents of ownership in, the policies or their proceeds. Certainly a mere possibility that the policies might become payable to his estate in case the beneficiary should happen to predecease him cannot be said to be an "incident of ownership" within any ordinary or natural meaning of those words!

In *Scott* v. *Commissioner*, 69 F. (2) 444 (8th C.C. A), the Court expressly recognized that the *Frick* case controlled as to cases arising under the 1918 Act and that it established that that Act did not apply to policies taken out and assigned or made payable to beneficiaries before that Act was passed, *even though the decedent had power to change the beneficiary*.

D. The fact that the assignment of the Berkshire policies was to the wife "provided she survives me," and that the Connecticut policy was payable to the wife or, if she died before the insured, to his children, or, if no such children or descendants of such children then living, to the insured's estate, furnishes no warrant for the inclusion of such policies.

As already shown, the same situation existed as to nine of the eleven policies involved in the *Frick* case, and was there made sufficiently apparent in the Estate's brief.

The case of *Levy's Estate* v. *Commissioner*, 65 F. (2) 412, (2nd C. C. A.) is inconsistent with Government's contention and decision of the Court below in the case at bar. In that case the decedent in 1916 cancelled his right to change the beneficiary as to forty-four of the policies there involved and irrevocably made his wife the beneficiary of a 3 percent annuity in the proceeds, but retained the power to change or revoke the designations of those who were to benefit after the decease of the wife. The question was whether the proceeds should be included in the decedent's gross estate under Section 302 (g) of the Revenue Act of 1924, the provisions of which were identical with Section 402 (f) of the Revenue Act of 1918. Section 302 of the 1924 Act, however, also contained a subdivision (h) which expressly made subdivision (g) apply to transfers, interests, rights, etc. "whether made, created, arising, existing, etc. before or after the enactment" of that Act.

The Court in the *Levy* case held that in view of the decedent's retained power of control, the proceeds were taxable, except to the extent of the value of the 3 percent annuity to the wife, but that the value of that

annuity was *not* to be included inasmuch as the wife had been irrevocably designated as the beneficiary of that annuity in 1916 and as the decedent no longer had any power to surrender, assign, or borrow on the policies so as to affect her right to that annuity without her consent.

Inasmuch as the wife's interest in the *Levy* case was merely the right during her life to an annuity equal to 3 percent of the proceeds, *i. é.*, a right during her life to receive annually an amount equal to 3 percent of the proceeds, it necessarily followed that she could receive that annuity only in case she survived the decedent. If she should not survive the decedent, he would, upon her death, have come into control of the *entire* proceeds of the policy.

We submit, therefore, that the case at bar cannot be distinguished from the *Levy* case on the Government's point as to the alleged contingent character of the beneficiary's interest in the proceeds of the policies.

As to that annuity the Court said (at page 415):—

> "Therefore, to the extent of the 3 percent annuity, the insured had no rights after he had irrevocably designated his beneficiary. The value of the annuity cannot be taxed. The fact that the insured continued to pay premiums after the applicable Revenue Acts were passed, does not affect the result. To the extent of this annuity only the order should be modified, for it may not be taxed."

We submit that those words and that conclusion apply with at least equal force to the proceeds of all of the policies in the case at bar. Mr. Upton had no rights after he had irrevocably designated his wife as the beneficiary. True it is, that the wife would have received nothing, and the control of the proceeds would

have reverted to Mr. Upton if his wife had predeceased him; *but that was equally true in the Levy case.* In the case at bar, just as much as in the *Levy* case, the interest of the beneficiary had been irrevocably established before the 1918 Act (the first Act to contain such an insurance provision) was passed, *beyond all possibility of control* on the part of the decedent. If such an interest did not come within Section 302 (g) of the 1924 Act, *a fortiori* it did not come within Section 402 (f) of the 1918 Act.

For the same reason we submit that the decision of the Court of Claims in *Industrial Trust Company* v. *United States* (which case is now before this Court on certiorari granted, No. 213, October Term, 1935) is erroneous, the interests of the beneficiaries in that case having been irrevocably established before the 1918 Act.

The case of *The Pennsylvania Company for Insurance on Lives and Granting Annuities* v. *Commissioner*, decided by the Circuit Court of Appeals for the Third Circuit on August 8, 1935, not yet appearing in the Federal Reporter, (but see 1935 C. C. H. Fed. Tax Service, Par. 9543), is also inconsistent with the decision of the Court below in the case at bar. This case came up on appeal from the Board of Tax Appeals, 29 B. T. A. 1306. Policies Nos. 15, 16, 17, 18 and 20, referred to in the opinion were payable to the decedent's wife "if she survives him, otherwise to his" estate. (See 29 B. T. A. 1306 at 1311.) Also it appeared from the opinion of the Court that No. 16 contained the same kind of limited surrender provisions as are contained in the Connecticut policy in the case at bar. The Court held that although those policies contained cash surrender provisions, they could not be exercised without the consent of the owner, and that as the wife had a vested interest

in the policies, her consent was necessary as an owner, and also as to No. 16 it pointed out that between the time of the expiration of the last-five-year period and the time of his death, the decedent had no money interest in the policies. This case arose under the 1926 Act, which contained the same express retroactive provision which was in the 1924 Act applicable to the insurance clause. Notwithstanding that fact, the Court held that inasmuch as the decedent had no control over the policies without the consent of the beneficiary, the policies were not taxable as the estate of the decedent had no interest in the policy at the date of his death.

We further submit that the cases of *May* v. *Heiner*, 281 U. S. 238, and *McCormick* v. *Burnet*, 283 U. S. 784, go fully as "far toward deciding the one now before us," as do the cases of *Schwab* v. *Doyle* (*supra*) and the related cases on which this Court relied in the *Frick* case, and for like reasons. The questions before the Court in those cases were as to the meaning and scope of Section 402 (c) of the 1918 Act. The decedent's interest in the property in *May* v. *Heiner* and the *McCormick* case was of exactly the same nature as the decedent's interest in the policies in the case at bar,—a *mere possibility*. If the beneficiary predeceased the decedent, the decedent would come back into control, otherwise not. The beneficiary's interest had been just as completely established in the one case as in the other, and nothing more was added to it by the decedent's death in the one case than in the other. On the other hand, the beneficiary could no more come into the full possession and actual enjoyment of the property in those cases before the decedent's death than could the beneficiary in the case at bar. In each case the decedent's interest which he possessed immediately prior to

the death was, as said by this Court in *May* v. *Heiner*, "obliterated by that event". (Page 243.)

In *May* v. *Heiner*, the decedent (Mrs. May) had transferred the property *before* the 1918 Act, to trustees to pay the income to her husband for life, *then to herself* for life, and after her decease to her children. As this Court pointed out, it was immaterial whether Mrs. May survived her husband. "At the death of Mrs. May no interest in the property passed from her to the living; title thereto had been definitely fixed by the trust deed." (Page 243.) Then it went on to say that it was at least doubtful whether the trusts or interests in a trust intended to be reached by Section 402 (c) included any others than those passing from the possession, enjoyment or control of the donor at his death, and that doubt must be resolved in favor of the taxpayer.

It must here be remembered that Section 402 (c) of the 1918 Act which provided for the inclusion of interests in property of which the decedent *has at any time* made a transfer in contemplation of or intended to take effect at his death, also contained the phrase, *"whether such transfer or trust is made or created before or after the passage of this Act,"* whereas in Section 402 (f) there were no words or phrases of that kind from which to warrant any intent that it was to apply where the interests had been irrevocably established *before* that Act was passed.

In the *McCormick* case, the same Section 402 (c) was involved. The trust was created by the decedent before the 1918 Act. The trust was in substance to pay the income to the decedent (the settlor) for life, and then to her three children for their lives and then over, but with a provision that on the death of the last survivor

of the three children the trust was to terminate and that upon such termination, or upon an earlier termination which might be made by the settlor with the consent of any one of the three children, the corpus should be paid over *to the settlor, if she should then be living,* otherwise to the children, or their heirs, etc. Here again this Court construed Section 402 (c) as not to apply in this situation.

Certainly if Section 402 (c), containing the retroactive phrase above referred to, should not be construed to apply in such situation, Section 402 (f), having no such retroactive phrase, cannot properly be construed to apply to such a situation as we have in the case at bar.

The situation in the *Klein* case is entirely different from that in the case at bar. In that case the beneficiary had *nothing but a life estate* until the decedent's death. The decedent *had retained* the remainder in himself, and *that remainder did not pass to anyone until his death.* The distinction is most clearly pointed out in the opinion of the Circuit Court of Appeals for the Eighth Circuit in *Helvering* v. *St. Louis Union Trust Co.,* 75 F. (2) 416 (argued before this Court on certiorari on October 24–25, 1935). Furthermore, it must follow, from the very fact that the ~~*Tyler*~~ Klein case was argued on the same day and along with the *McCormick* case, and from the fact that this Court reversed the decision of the lower Court in the *McCormick* case, (which had stressed the defeasance clause as being sufficient to make the transfer incomplete), that a mere possibilty of reverter as in the *McCormick* case, as distinguished from a retained remainder as in the *Klein* case, is *not* sufficient to bring the transfer within the 1918 Act.

The same principle was applied in *Wallace* v. *Commissioner,* 27 B. T. A. 902; affirmed per curiam 71 F. (2) 1002 (2nd C. C. A.) on the authority of *May* v. *Heiner;* certiorari denied, 293 U. S. 600. In that case the decedent created a trust to pay the income to herself for life, and on her death to pay the corpus *to her daughter "if she be living," and if the daughter predeceased her, the property reverted to the grantor.* How strikingly like the assignment and policy provisions in the case at bar! The Court held that the provisions in the 1928 Act, corresponding to Section 402 (c) of the 1918 Act, did not apply. (See also *Helvering* v. *Duke,* 290 U. S. 591, where a similar decision of the lower Court was affirmed by this Court by an equally divided Court. After examining the briefs in the Duke case, it appears that there were certain important points as to the nature and extent of the control reserved by the settlor which tended to distinguish that case, and which we are inclined to believe explain the division in this Court.)

The decisions of this Court in the *Chase Bank* case and in the case of *Tyler* v. *United States,* 281 U. S. 497, which are so much relied on by the Government, furnish no assistance in determining the scope and effect of Section 402 (f) of the 1918 Act, nor in attempting to explain away *May* v. *Heiner,* the *McCormick* case, and other similar cases, for the cases relied on by the Government dealt solely with the *power* of Congress, and not the *intent* of Congress. As pointed out by this Court in *Helvering* v. *Grinnell,* 294 U. S. 153, neither of those two cases "sheds any light upon the meaning and application of the statutory provisions. In neither of the cases was the Court concerned with the meaning of the Act. The sole question for determination was as

to the constitutional validity of the Act." The same thing applies as to *Saltonstall* v. *Saltonstall*, 276 U. S. 260.

In the Court below, the Government in its brief said:

> "The question in every case is not whether there has been a transfer, in the strict sense of the term, of property by death, but whether death has brought into being or ripened for the recipient of the donor's bounty valuable property rights not theretofore enjoyed. *Tyler* v. *United States*, 281 U. S. 497."

While that might well be the question in a case involving the constitutional validity of the statute, obviously such an argument has no place in the case at bar, where the question is as to whether Section 402 (f) of the 1918 Act was intended to apply to policies where the beneficiaries' interest had been irrevocably established beyond all possibility of control by the decedent *before* that Act was passed.

The Government in the Court below relied on *Sargent* v. *White*, 50 F. (2) 410, but fails to point out that the facts in that case were practically identical with those in the *Klein* case, in that a life estate was given to the wife, with remainder *to the grantor;* if, however, the wife survived it was to become hers absolutely. It also fails to point out that in *Nichols* v. *Bradley*, 27 F. (2) 47, decided by the same Court, where there was a trust of substantially the same kind as that involved in the *McCormick* case, that same Court held that in such case the beneficiaries' rights passed to them at once upon the declaration of trust subject to defeasance in case they failed to survive the trustor, and that the trustor's death merely "foreclosed the possibility of her

acquiring a reversionary interest" in the property, and that, therefore, no tax liability arose at her death.

We believe that it is a matter of common knowledge that in the overwhelming majority of insurance policies which were in existence when the 1918 Act was passed, the interests of the beneficiaries were subject to be divested if they did not survive the insured, in which case the policies would be payable to the decedent's estate. While the language of the various provisos or conditional clauses varied considerably (see pp. 8–9, *supra*), nevertheless, so far as we have been able to discover, no Court or other tribunal, until the decision of the Court below in the case at bar and the Court of Claims in the Industrial Trust Company case,* has ever considered that the interest of the beneficiary was other than an absolutely vested one, subject only to the possibility of its being divested in case of the beneficiary's death prior to that of the insured. The situation as to such policies is, we submit, quite analogous to that in *May* v. *Heiner*, the *McCormick*, and the *Wallace* case, and far different from that in the *Klein* case.

* In the case of *Ballard* v. *Helburn* (unreported officially) in the District Court for the Western District of Kentucky, May 2, 1933 (for a copy of the decision see C. C. H. 1933 Fed. Tax Law, Par. 9338), the Court, in a well reasoned opinion, rejected the Government's contention that the proceeds of two policies were taxable under the 1926 Act where the decedent had assigned the policies to the wife, if living, otherwise to the daughter, if living, and if not, then to his own estate, and he had no control over the policies or their proceeds. This case has been argued on appeal in the Sixth Circuit, but we understand that the decision is to be withheld until after the decision of this Court in the case at bar.

II.

IF, NOTWITHSTANDING THE FRICK CASE AND THE CASES ABOVE REFERRED TO, THIS COURT FEELS THAT WE GET TO THE CONSTITUTIONAL POINT, WE SUBMIT THAT, INASMUCH AS THE DECEDENT RETAINED NO CONTROL OVER THE POLICIES OR THEIR PROCEEDS, AND AS THE RIGHTS OF THE BENEFICIARIES WERE BEYOND THE CONTROL OF THE DECEDENT BEFORE THE 1918 ACT WAS PASSED, THE CONSTITUTIONAL POINT IS ALREADY SETTLED AGAINST THE GOVERNMENT BY THE CASE OF NICHOLS v. COOLIDGE, 274 U. S. 531.

In this connection we refer also to the case of *Coolidge* v. *Long*, 282 U. S. 582, involving the constitutionality of the Massachusetts inheritance tax. In this case a husband and wife transferred property to trustees in 1907 in trust to pay the income to the settlors during their joint lives and the life of the survivor, and on the death of the survivor to divide the property among their sons, provided that if any son should predecease the survivor of the settlors his share should go to his heirs at the death of such survivor. There was no power of revocation, modification or termination. This Court held that the inheritance tax was unconstitutional. At page 597–8 this Court said:

> "It was a grant *in praesenti* to be possessed and enjoyed by the son upon the death of such survivor. . . . The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment. The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust. . . . *Upon the happening of the event without more, the trustees were bound to hand over the property to the beneficiaries.* Neither the death of Mrs. Coolidge

> nor of her husband *was a generating source of any right in the remaindermen. . . . Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts,* were derived solely from the deed."

This language, with but slight paraphasing, we submit is equally applicable to the situation in the case at bar.

In *Coolidge* v. *Long,* this Court also said at page 596:

> "In *Nichols* v. *Coolidge,* 274 U. S. 531, we considered the trust deed of Mr. Coolidge that is now before us. The question in that case was whether the value of the property so conveyed prior to the enactment should be included in her estate for the purpose of ascertaining the federal estate tax thereon. We said (p. 542): 'This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. . . . And we must conclude that § 402 (c) of the statute here under consideration (the 1918 Act) insofar as it requires that there shall be included in the gross estate the value of property *transferred by a decedent prior to its passage* merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation'."

Again at page 599 the Court said:

> "No Act of Congress has been held by this Court to impose a tax upon posession and enjoyment, the right to which had fully vested prior to the enactment."

This case also distinguishes the case of *Tyler* v. *United States,* 281 U. S. 497, so much relied upon by the Government in the case at bar, pointing out at page 599

that "putting aside a common law fiction [that case dealt with a tenancy by the entirety] and having regard to substance, the death of one of the parties was in fact the generating source of important and definite accessions to the *property rights* of the other".

In the case of *Gwinn* v. *Commissioner,* 287 U. S. 224 at 229, a case holding that the interest of a joint tenant must be included in the gross estate even though the tenancy was created before the Act, this Court distinguishes *Nichols* v. *Coolidge* and *Coolidge* v. *Long* by pointing out that "In them the rights of the survivors became finally and definitely fixed before the passage of the Act—nothing was added as the result of death." At page 229 this Court pointed out that in a joint tenancy the rights of the possible survivor were not irrevocably fixed at the time of the creation of the tenancy "since under the state laws the joint estate might have been terminated through voluntary conveyance by either party, through proceedings for partition, by any involuntary alienation under an execution. The right to effect these changes in the estate was not terminated until the co-tenant's death. *Cessation of this power after* enactment of the Revenue Act of 1924 presented proper occasion for imposition of the tax. The death became the generating source of definite accessions to the survivor's property rights."

The *per curiam* decision of this Court in *Third National Bank* v. *White,* 287 U. S. 577, makes it clear that this Court treats a tenancy by the entirety to be in substance the same as a joint tenancy, so far as estate taxes are concerned, for it cites the *Gwinn* case.

In the case of the insurance policies in the case at bar the rights of the beneficiaries had been irrevocably fixed so far as Mr. Upton was concerned long before

the 1918 Act. His death *added nothing* to Mrs. Upton's *rights* to the proceeds. There was no cessation after the enactment of the 1918 Act of any *power* which could have affected their rights.

As pointed out above in this brief, the Government can get no comfort out of the *Chase Bank* case for not only did it involve policies taken out *after* the Act in question, but its decision was clearly based on the fact that the decedent had retained some of the legal incidents of ownership, none of which were retained in the case at bar. We submit, therefore, that that case supports the taxpayer's rather than the Governments's position on the constitutional point in the case at bar.

In the Court below, the Government referred to Judge Brewster's decision in *Sampson* v. *United States,* 1 Fed. Supp. 95. It is to be noted, nowever, that that case dealt with a later act and that the questions discussed in the *Sampson* case are not involved in the case at bar unless the *Frick* case first be held to be no longer law as to the proper construction of the 1918 Act. Furthermore, an examination of the opinion in the *Sampson* case will make it clear that Judge Brewster's decision in that case really hinged upon his conclusion that the decedent had retained some measure of control over the policies, such as the power to surrender them for cash or to borrow on them, and *that he recognized that otherwise the tax would have been unconstitutional,* citing *Nichols* v. *Coolidge,* 274 U. S. 531, *May* v. *Heiner,* and the *Reinecke* case. In the case at bar the decedent had no such control, for he could do nothing with the policies without the consent of the beneficiary.

III.

CONCLUSION.

The case at bar is squarely within the *Frick* case. The *Frick* case is controlling where the tax is claimed under the Revenue Act of 1918 as to such policies as are here involved, and the tax in the case at bar cannot be sustained without overruling that case. It is inconceivable that this Court, having established that the 1918 Act should not be construed to apply to such policies as are here involved, should overrule itself and declare that Congress meant just the opposite by that Act from what this Court had previously said it meant. Even without the *Frick* case, the decisions of this Court in *May* v. *Heiner* and the *McCormick* case, which dealt with the construction of Section 402 (c) of the 1918 Act, should require the conclusion that Section 402 (f) of the 1918 Act did not apply to the policies here involved. Finally, if Section 402 (f) of the 1918 Act be now held to apply to these policies, it would be to that extent unconstitutional.

Wherefore, the taxpayers respectfully submit that the decision in the Court below should be reversed and the decision of the District Court affirmed.

Respectfully submitted,

GEORGE S. FULLER,

Attorney for Petitioners.

No. 84

In the Supreme Court of the United States

October Term, 1967

NORMAN W. BERGMAN, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	7

CITATIONS

Cases:

Heiner v. *Grandin*, 44 F. (2d) 141, 56 F. (2d) 1082	5
Levy's Estate v. *Commissioner*, 65 F. (2d) 412	6
Lewellyn v. *Frick*, 268 U. S. 238	5
Liebes v. *Commissioner*, 63 F. (2d) 870	6
United States v. *Mitchell*, 271 U. S. 9	5
Webster v. *Fall*, 266 U. S. 507	5

Statute:

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097, Sec. 402	2

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 83

NORMAN W. BINGHAM, JR., ET AL., EXECUTORS, petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 61–64) is reported in 7 F. Supp. 907. The majority and dissenting opinions in the Circuit Court of Appeals (R. 83–88) are reported in 76 F. (2d) 573.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 26, 1935. (R. 92.) The peti-

tion for a writ of certiorari was filed May 29, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the proceeds of certain life insurance policies, taken out before the effective date of the 1918 Act, may under Section 402 (f) of the 1918 Act be included in the insured's gross estate, where the beneficiaries' defeasible interests became indefeasible only at the insured's death after the effective date of that Act.

STATUTE INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097:

> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, * * * intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. * * *
>
> (f) To the extent of the amount receivable by the executor as insurance under poli-

cies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

STATEMENT

This case involves the inclusion in the gross estate of King Upton, who died on February 27, 1921 (R. 7), of the proceeds of five policies of insurance on his life. All five were taken out before the effective date of the Revenue Act of 1918. The insured continued to pay the premiums thereon up to the time of his death. (R. 9.)

Four of the policies, issued by the Berkshire Life Insurance Company, were originally payable to his executors, administrators, or assigns. (R. 11, 17, 23, 29.) On July 25, 1904, the insured assigned to his wife his interest in those policies, *provided she survived him.*[1] (R. 35, 62.) Three of those four policies contained provision for cash surrender. (R. 19, 25, 31.)

The fifth policy, issued by the Connecticut Mutual Life Insurance Company, named the decedent's wife as beneficiary with a provision that if she should predecease him, the proceeds would be payable to his children, or in default thereof, to his legal representatives. (R. 43.) The policy fur-

[1] The assignment was subject to a prior assignment (not material here) to the insurance company as security for a loan, which was outstanding at the time of his death.

ther provided that at the end of ten years from its date (May 22, 1883), or at the end of each five years thereafter, the company *would pay the cash value to the insured* upon surrender of the policy. (R. 43.)

The District Court ruled that none of the proceeds from these policies might be included in the decedent's gross estate, but its judgment was reversed by the Circuit Court of Appeals.

ARGUMENT

The sole issue here is whether the proceeds of the five policies may be included in the insured's gross estate, in view of the fact that the policies were taken out before the effective date of the 1918 Act. Section 402 (f) of the 1918 Act requires the inclusion in a decedent's gross estate:

> To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

The court below decided that the proceeds of the five policies came within the purview of that section. The four Berkshire policies were included, since the interests of the assignee were contingent and became indefeasible only at the insured's death. The Connecticut policy was similarly included because it was only at the insured's death that it be-

came certain for the first time that he would never exercise the right to receive the cash value of the policy by surrendering it. We submit that the court below was correct, since the interests of the beneficiaries in the policies became complete for the first time at the insured's death, which occurred after the effective date of the 1918 Act. Hence, this case does not involve a retroactive application of the statute.

Lewellyn v. *Frick*, 268 U. S. 238, is not authority to the contrary. The opinion in that case did not consider the effect of the insured's power to terminate the policy by cash surrender or the effect of the contingent character of the beneficiary's interest. It is true that a careful examination of the record in the *Frick* case discloses policies similar to the above and also policies in which the insured retained the right to change the beneficiary. However, since this Court apparently did not consider the effect of such elements, the decision cannot be deemed as authoritative in this regard. Cf. *Webster* v. *Fall*, 266 U. S. 507, 511; *United States* v. *Mitchell*, 271 U. S. 9, 14.

This is strikingly illustrated in *Heiner* v. *Grandin*, 44 F. (2d) 141, 56 F. (2d) 1082 (C. C. A. 3d). That case involved policies in which the insured retained the right to change the beneficiary, and arose under the same statute as the *Frick* case. The court recognized (44 F. (2d) 141, 143) that the insured in the *Frick* case retained similar control as to some of the policies therein, but held that un-

der the circumstances the *Frick* decision was not binding. This Court denied certiorari. 286 U. S. 561. See also *Liebes* v. *Commissioner,* 63 F. (2d) 870, 873 (C. C. A. 9th).

Levy's Estate v. *Commissioner,* 65 F. (2d) 412 (C. C. A. 2d), is not in conflict with the decision below. It was there held that a tax may not be imposed *to the extent of* an annuity arising out of certain insurance policies in which the insured had irrevocably designated the annuitant.[2]

The petitioner alleges various conflicts with decisions of other Circuit Courts of Appeals, none of which appear to present the issue involved herein. In the main those cases are concerned with whether or not certain transfers of property were "intended to take effect in possession or enjoyment at or after" death. This case arises under another provision of the statute which in broad terms requires the inclusion in a decedent's gross estate of the proceeds of all life insurance policies. The only question here is whether such proceeds may be included where the policies were taken out before the effective date of any revenue act imposing such taxes. We believe that the court below correctly required their inclusion, since the rights

[2] In addition to the five policies involved in this petition, the Commissioner originally sought to include in the decedent's estate the proceeds from two other policies (the Manhattan policies). But the court below excluded them from the gross estate, because the beneficiaries had been irrevocably designated. (R. 88.) The Government is not seeking review as to those two policies.

arising out of those policies became complete only at the decedent's death.

CONCLUSION

The decision below is correct, and is not in conflict with any decision of any other Circuit Court of Appeals or with any decision of this Court. The petition should be denied.

Respectfully submitted.

STANLEY REED,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
DAVID E. HUDSON,
JAMES W. MORRIS,
ARNOLD RAUM,
Special Assistants to the Attorney General.

JULY 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

FILE COPY

FILED
NOV 15 1935

No. 83

In the Supreme Court of the United States

OCTOBER TERM, 1935

NORMAN W. BINGHAM, JR., ET AL. EXECUTORS, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Summary of argument	5
Argument:	
I. Section 402 (f) of the 1918 Act requires the inclusion of these insurance policies in the decedent's gross estate	6
II. So construed, Section 402 (f) is constitutional	18
Conclusion	23

CITATIONS

Cases:	
Attorney-General v. *Dobree*, [1900] 1 Q. B. 442	21
Attorney-General v. *Pearson*, [1924] 2 K. B. 375	21
Becker v. *St. Louis Union Trust Co.*, No. 262, October term, 1935	14
Burnet v. *Guggenheim*, 288 U. S. 280	12
Burnet v. *Wells*, 289 U. S. 670	22
Bushman v. *United States*, 8 F. Supp. 694, certiorari denied, May 27, 1935	13
Chase National Bank v. *United States*, 278 U. S. 327	9, 10, 11, 12, 17
Commissioner v. *Schwarz*, 74 F. (2d) 712	14
Cooper v. *United States*, 280 U. S. 409	18
Fawcus Machine Co. v. *United States*, 282 U. S. 375	18
Guaranty Trust Co. v. *Blodgett*, 287 U. S. 509	14
Gwinn v. *Commissioner*, 287 U. S. 224	12
Heiner v. *Grandin*, 44 F. (2d) 141, 56 F. (2d) 1082, certiorari denied, 286 U. S. 561	7, 8, 9
Helvering v. *St. Louis Union Trust Co.*, No. 25, October Term, 1935	14
Hoblitzelle v. *United States*, 3 F. Supp. 331	14
Industrial Trust Co. v. *United States*, No. 213, October Term, 1935	23
Klein v. *United States*, 283 U. S. 231	13
Lewellyn v. *Frick*, 268 U. S. 238	7, 8, 9, 11, 23
Liebes v. *Commissioner*, 63 F. (2d) 870	11

Cases—Continued. Page

Milliken v. *United States*, 283 U. S. 15 ..... 18, 19
Nichols v. *Coolidge*, 274 U. S. 531 ..... 18, 20, 23
Pennsylvania Company, etc., et al. v. *Commissioner*, C. C. A. 3d, decided August 8, 1935, now No. 576, October Term 1935 16
Porter v. *Commissioner*, 288 U. S. 436 12
Reinecke v. *Smith*, 289 U. S. 172 15
Reinecke v. *Northern Trust Co.*, 278 U. S. 339 ..... 9, 11, 12, 22
Robinson v. *Commissioner*, 63 F. (2d) 652, certiorari denied, 289 U. S. 758 13
Saltonstall v. *Saltonstall*, 276 U. S. 260 12
Sargent v. *White*, 50 F. (2d) 410 14
Taylor-Wharton Iron & Steel Co. v. *Commissioner*, 74 F. (2d) 300 8
Third Nat. Bank & Trust Co. v. *White*, 287 U. S. 577, affirming 58 F. (2d) 1085, affirming 45 F. (2d) 911 12
Tyler v. *United States*, 281 U. S. 497 13
Union Trust Co. v. *United States*, 54 F. (2d) 152, certiorari denied, 286 U. S. 547 14
United States v. *Mitchell*, 271 U. S. 9 11
United States v. *Wells*, 283 U. S. 102 22
Webster v. *Fall*, 266 U. S. 507 11

Statutes

Act of March 3, 1917, c. 159, 39 Stat. 1000, Title III 18
Revenue Act of October 3, 1917, c. 63, 40 Stat. 300, Title IX 18
Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 402 2

Miscellaneous:

Hanson, Death Duties, 6th Ed., 1915 20
H. Rep. No. 767, 65th Cong., 2d sess., p. 22 21

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 83

NORMAN W. BINGHAM, JR., ET AL., EXECUTORS,
petitioners

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 61–64) is reported in 7 F. Supp. 907. The majority and dissenting opinions in the Circuit Court of Appeals (R. 83–91) are reported in 76 F. (2d) 573.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 26, 1935. (R. 91.) The petition

for a writ of certiorari was filed May 29, 1935, and was granted October 14, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the proceeds of certain life-insurance policies may be included in the insured's gross estate.

STATUTE INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097:

> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

STATEMENT

King Upton died on February 27, 1921. (R. 7.) During his lifetime he had taken out various policies of insurance on his own life. This case involves the propriety of including the proceeds of

five[1] of such policies in his gross estate under the Revenue Act of 1918. All five were taken out before the effective date of that Act, and the premiums thereon were paid by the decedent out of his individual funds, from the time of their issuance up to the time of his death. (R. 8, 9.)

Four of the policies were issued by the Berkshire Life Insurance Company, and were originally payable to the decedent's executors, administrators, or assigns. (R. 11, 17, 23, 29.) Three of those four policies contained provision for cash surrender. (R. 19, 25, 31.) On July 25, 1904, the decedent assigned his interest in all four of the Berkshire policies to his wife subject to the condition that she survive him. The instrument of assignment read (R. 35):

> In consideration of love, affection, and one dollar I do hereby assign all my right, title and interest in policies number 35,098, 41,714, 47,954, and 47,955 issued by the BERKSHIRE LIFE INSURANCE COMPANY OF PITTSFIELD, MASS., insuring the life of King Upton of Salem, Mass., and all additions to said policy, whether now or hereafter apportioned, (reserving and excepting the right to the assured to apply the cash value of any

[1] The proceedings in the District Court and the Circuit Court of Appeals involved seven policies. Two of them, issued by the Manhattan Life Insurance Company (R. 9), were excluded from the decedent's gross estate by the Circuit Court of Appeals. The Government has not petitioned for review as to those two policies.

dividends or additions thereon in payment of premiums hereafter due on said policy) unto my wife, Annie D. Upton, *provided she survives me.* This assignment is made subject to a previous assignment[2] to the Berkshire Life Ins. Co. dated June 30, 1904.

Dated at Boston, Mass. this 25th day of July, A. D. 1904.

[SEAL] (Signed) KING UPTON.

In presence of—

(Signed) THOS. COURTIS.

(Italics supplied.)

The fifth policy, issued by the Connecticut Mutual Life Insurance Company of Hartford, named the insured's wife as beneficiary, with provision that if she should predecease him, the proceeds would be payable to his children, or in default thereof to his legal representatives. (R. 43.) The policy further provided that at the end of ten years from its date (May 22, 1883), or at the end of each five years thereafter, the company *would pay the cash value to the insured* upon surrender of the policy within thirty days after the end of each such period. (R. 43.)

The District Court held that none of the proceeds might be included in the decedent's gross estate, but its judgment was reversed by the Circuit Court of Appeals.

---

[2] The previous assignment referred to was as security for a loan, which was outstanding in the amount of $5,900 at the time of the insured's death. However, the Government is seeking to include in the gross estate only such proceeds as exceeded the amount of that loan. (R. 9.)

SUMMARY OF ARGUMENT

1. Section 402 (f) of the 1918 Act is broad and all-inclusive. It requires that policies of insurance taken out by a decedent on his own life shall be included in his gross estate to the extent that the proceeds exceed $40,000 where they are receivable by beneficiaries other than his executors. The statute makes no requirement as to when the policies must be taken out. In *Lewellyn* v. *Frick, infra,* however, this Court decided that certain policies taken out before the effective date of the 1918 Act could not be included chiefly because the statute should be construed as referring only to transactions taking place after it was passed.

But as applied to the policies herein the statute does not have any retroactive operation, and they are therefore not within the scope of the *Frick* decision. This Court has evinced a general tendency to determine retroactivity not by the date when the policies were taken out, but rather by the interests which passed or were rendered indefeasible at death. The *Frick* case does not stand for the proposition that *every* policy taken out before the 1918 Act is exempt from the operation of Section 402 (f). That decision applies only where the statute would operate retroactively.

In this case the wife's interest in the four Berkshire policies was wholly contingent upon survivorship. In the Connecticut policy her rights were similarly incomplete, as well as being subject to the

control of the insured at the end of each five-year period. In all five policies, it was the death of the insured that rendered her rights indefeasible for the first time. But that event occurred after the effective date of the 1918 Act. Accordingly, we submit that the statute would not have any retroactive operation, and is therefore applicable.

2. As so construed, the statute is constitutional. It is appropriate to include the proceeds of these policies in the measure of the insured's gross estate, not only because life insurance is *per se* testamentary and may be assimilated to property passing at death, but also because the contingent character of the beneficiary's rights rendered them incomplete until the insured's death.

ARGUMENT

I

SECTION 402 (F) OF THE 1918 ACT REQUIRES THE INCLUSION OF THESE INSURANCE POLICIES IN THE DECEDENT'S GROSS ESTATE

A

THE ISSUE IS NOT FORECLOSED BY LEWELLYN v. FRICK. WHETHER SECTION 402 (F) OPERATES RETROACTIVELY MUST BE CONSIDERED SEPARATELY IN EVERY CASE

Section 402 (f) of the 1918 Act states that the value of a decedent's estate shall be determined by including therein "the excess over $40,000[4] of the

[4] The $40,000 exemption has been allowed by the Commissioner, and no question is raised in respect thereof. (R. 8.)

amount receivable by all other [other than executor] beneficiaries as insurance under policies taken out by the decedent upon his own life". The language would seem broad and all-inclusive.

An exception, however, was read into that language by this Court in *Lewellyn* v. *Frick,* 268 U. S. 238, namely, that the statute is inapplicable where its operation would be retroactive in effect. It therefore excluded from a decedent's estate eleven policies taken out before the effective date of the 1918 Act.

It is our position, however, that *Lewellyn* v. *Frick* does not prevent the inclusion of *every* policy taken out before the enactment of the 1918 Act. In certain cases the statute would not have a retroactive effect because of reserved powers in the insured or because of contingencies involved in a beneficiary's interests which became indefeasible only upon the insured's death after the passage of the statute. And in such cases where there would in fact be no retroactive operation of the statute we believe that the all-inclusive language of Section 402 (f) is not subject to the exception read into it by the *Frick* decision.

Thus, in *Heiner* v. *Grandin,* 44 F. (2d) 141, 56 F. (2d) 1082 (C. C. A. 3d), the decedent had taken out a policy in 1894 and another in 1906, reserving in both of them the power to change the beneficiary. His death in 1920 raised the question as to whether those policies were subject to the provisions of Sec-

tion 402 (f) of the 1918 Act. The Circuit Court of Appeals held that since the statute had no retroactive effect as to those policies they were not subject to the limitations imposed upon Section 402 (f) by the *Frick* case. Had this Court intended the *Frick* decision to stand for the proposition that *every* policy taken out before the 1918 Act could not be included under Section 402 (f), the decision in *Heiner* v. *Grandin* would have been in square conflict with the *Frick* decision. Yet this Court denied certiorari in the *Grandin* case (286 U. S. 561).

While the denial of certiorari may not be considered as an adjudication upon the merits, we think that it may have some significance. Thus, where the petition for certiorari alleges a conflict with an earlier decision of this Court, the holding of which may be subject to two interpretations, one in square conflict with the decision seeking review, and the other distinguishable, it is reasonable to infer that in denying certiorari, the Court regarded its earlier decision as not being in conflict with the decision below.[4] Such reasoning in no way seeks to employ the denial of certiorari as an indication of what this Court thought of the merits of the later case. Whether the Court felt the later de-

---

[4] Cf. *Taylor-Wharton Iron & Steel Co.* v. *Commissioner*, 74 F. (2d) 300, 301 (C. C. A. 3d):

"The action of the Supreme Court in denying certiorari in these two cases, 290 U. S. 670, 677, while not officially significant, inclines us to the belief that the two courts properly understood the law of the *Woolford Realty Co.* case and that this court is correctly applying it now."

cision of the lower court right or wrong, it is a fair assumption that it did not consider its own earlier decision inconsistent with the later one. Thus it is reasonable to assume that in denying certiorari in the *Grandin* case, this Court did not understand the *Frick* case as excluding from Section 402 (f) *all* policies taken out before the 1918 Act. And we submit that whether the *Frick* case applies must be determined in each instance by considering whether the statute would in fact operate retroactively.

That the scope of the *Frick* decision is not as broad as the petitioners herein assert is further evidenced by this Court's combined treatment of *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, and *Chase National Bank* v. *United States*, 278 U. S. 327. In the *Chase National Bank* case the decedent had taken out three policies after the enactment of the 1921 Act reserving the power to change beneficiaries, and died while that statute was still in effect. The Court held that Section 402 (f) of the 1921 Act (identical with the corresponding provisions of the 1918 Act) was applicable. Since the policies were taken out after the effective date of the Act, that decision, if it stood alone, might not have any significance with reference to the present issue. But the Court on that same day decided *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, holding, *inter alia*, that two trusts, created in 1903 and 1910 respectively, revocable by the settlor, were properly included in the gross estate of the settlor

under the 1921 Act. In reaching that result, the Court relied upon its decision in the *Chase National Bank* case (p. 345):

> * * * in *Chase National Bank* v. *United States,* decided this day, *ante,* p. 327, the decision is rested on the ground, earlier suggested with respect to the Fourteenth Amendment in *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 271, that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death. Hence § 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute. For that reason, stated more at length in our opinion in *Chase National Bank* v. *United States, supra,* we hold that the tax was rightly imposed on the transfers of the corpus of the two trusts and as to them the judgment of the court of appeals should be reversed.

Thus, the Court employed the *Chase National Bank* case to justify a holding that it was not retroactive taxation to include in a decedent's gross estate transfers made by him before the effective date of any Federal estate tax statute, but which became complete only at his death. The inference is plain, that had the policies in the *Chase National Bank* case been taken out before the first Federal estate tax statute (or before either the 1918 or 1921 Acts), it would not have been retroactive taxation to include them in the decedent's gross estate. See

also *Liebes* v. *Commissioner*, 63 F. (2d) 870, 873 (C. C. A. 9th).

Accordingly, the *Chase National Bank* case, when considered together with *Reinecke* v. *Northern Trust Co.*, is further evidence that this Court did not consider the *Frick* case as holding that it would be retroactive taxation in every case to include policies taken out before the enactment of the 1918 Act. We submit, therefore, that the *Frick* case is not categorically determinative of the present controversy merely because the policies herein were taken out before the 1918 Act, and that it is necessary to examine the characteristics of these policies to determine whether the statute would in fact operate retroactively if applied.

Reference to the record in the *Frick* case will disclose, it is true, that three of the policies involved therein had been assigned by the insured reserving the right to revoke the assignments, a power comparable to the power to change the beneficiary, and that in several other policies, the beneficiaries' interests were contingent. But the Government did not make any argument based on that power of revocation or the defeasible aspects of the beneficiaries' interests, nor did the Court consider or even allude to them in its opinion. Under those circumstances, the decision cannot be regarded as having passed on the effect of such elements. Cf. *Webster* v. *Fall*, 266 U. S. 507, 511; *United States* v. *Mitchell*, 271 U. S. 9, 14. Those circumstances, when considered along with the

Chase National Bank case, *Reinecke* v. *Northern Trust Co.*, and the denial of certiorari in the *Grandin* case, would seem to indicate that the issue herein is not foreclosed by the *Frick* case.

B

SECTION 402 (F) DOES NOT OPERATE RETROACTIVELY AS TO THE POLICIES HEREIN

Transactions initiated before the effective date of a statute are frequently considered as completed only at the decedent's death occurring after the passage of the statute. A common type of such transaction is a transfer with reserved power to revoke, alter, or amend. It is only upon termination of such power that the transfers are regarded as complete. See *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Saltonstall* v. *Saltonstall*, 276 U. S. 260; *Porter* v. *Commissioner*, 288 U. S. 436; *Gwinn* v. *Commissioner*, 287 U. S. 224. Cf. *Burnet* v. *Guggenheim*, 288 U. S. 280.

But a transfer with reserved powers to revoke, etc., is not the only kind of such transaction that may be incomplete until a later date. The creation of an estate by the entirety, for example, gives neither spouse any right of severance, revocation, etc. Yet the whole estate may be included in the gross estate of the spouse who created the tenancy, regardless of when it was created, because the surviving spouse's rights depended upon outliving the other, and became absolute for the first time at the other's death. *Third Nat. Bank & Trust Co.* v.

White, 287 U. S. 577, affirming *per curiam*, 58 F. (2d) 1085 (C. C. A. 1st), affirming *per curiam*, 45 F. (2d) 911 (Mass.); *Robinson* v. *Commissioner*, 63 F. (2d) 652 (C. C. A. 6th), certiorari denied, 289 U. S. 758; *Bushman* v. *United States*, 8 F. Supp. 694 (C. Cls.), certiorari denied, May 27, 1935, No. 871, 1934 Term. Cf. *Tyler* v. *United States*, 281 U. S. 497.

In this case, the four Berkshire policies were originally payable to the insured's executors, administrators, or assigns. By an instrument of assignment he purported to transfer his rights in those policies to his wife, but *specifically conditioned the assignment upon her survivorship.* It would seem plain that the wife acquired only a contingent interest in the policies. Entirely apart from the decedent's payment of premiums up to the time of his death, her rights depended on outliving her husband. His death was the indispensable event giving rise to, or at least enlarging, valuable property rights in the wife, not theretofore possessed or enjoyed. As this Court said in *Klein* v. *United States*, 283 U. S. 231, 234:

> Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying

> the terms of the taxing act and justifying the tax imposed. Compare *Tyler* v. *United States,* 281 U. S. 497.

See also *Guaranty Trust Co.* v. *Blodgett,* 287 U. S. 509; *Sargent* v. *White,* 50 F. (2d) 410 (C. C. A. 1st); *Hoblitzelle* v. *United States,* 3 F. Supp. 331 (C. Cls.); *Univn Trust Co.* v. *United States,* 54 F. (2d) 152 (C. Cls.), certiorari denied, 286 U. S. 547; *Commissioner* v. *Schwarz,* 74 F. (2d) 712 (C. C. A. 2d).[5]

As in those cases, the beneficiary's rights herein became absolute and indefeasible for the first time at the death of the insured. But that event occurred *after* the effective date of the 1918 Act.

---

[5] See also *Helvering* v. *St. Louis Union Trust Co.*, No. 25, October Term, 1935; *Becker* v. *St. Louis Union Trust Co.*, No. 262, October Term, 1935. In both of the *St. Louis Union Trust Co.* cases, the transfers were made while an estate tax statute was in effect. They, therefore, do not raise questions of retroactivity, but are concerned chiefly with whether the transfers were of such character as to render them testamentary in effect. In the present case, the testamentary character of the transactions is supported not only by the contingent nature of the beneficiary's interests which were made indefeasible at the decedent's death, but also upon the characteristics of insurance which is inherently testamentary. Like gifts in contemplation of death, insurance may be properly assimilated to property of a decendent passing at his death. And the reason for such result depends, not upon the theory that property of the decendent passes at his death, but upon the theory that it is proper to include in his gross estate substitutes for testamentary dispositions. Thus, even if it should be held that the transfers in the *St. Louis Union Trust Co.* cases may not be included in the decedent's estates therein, such decision should not militate against our present position, if for no other reason, because insurance is *per se* testamentary.

And since the beneficiary became indefeasibly entitled to those proceeds for the first time at the decedent's death, there is no retroactive operation of the statute. Cf. *Reinecke* v. *Smith*, 289 U. S. 172, 175.

In the Connecticut policy, the decedent's wife was named as beneficiary, but her rights to the proceeds were specifically conditioned upon survivorship. Accordingly, the same reasoning which operated in the case of the four Berkshire policies to overcome the retroactivity objection is applicable here. But there is an additional feature in the Connecticut policy which we believe significant on this issue, if not dispositive thereof: namely, the right of cash surrender.

The policy contained the following provision (R. 43):

> And at the end of ten years from the date hereof [May 22, 1883], or at the end of each period of five years thereafter, this Policy having been in force during such entire periods for the full sum first above named as insured hereby and not otherwise, this Company will pay a Cash Value therefor, to be ascertained by the Table of Cash Values endorsed hereon and hereby made a part of this Contract; such Cash Value to be payable at its said office upon surrender hereof within thirty days after the end of each such period, to, and this Policy to be first released and discharged to the satisfaction of said Company by King Upton, the Insured; and it is hereby agreed by all the parties hereto

> that such surrender, release, and discharge shall terminate this Policy, and any and every obligation whatsoever of said Company thereunder, to any and every person whatsoever:
>
> * * * * *

Thus, entirely apart from the contingency of survivorship, the insured had it within his power, for a period of thirty days from May 22, 1893, and a similar period at the end of each five years from that date, to wipe out all rights under that policy and to obtain for himself the cash value thereof.* Thus, while the beneficiary's interest may not have been wholly illusory, it was so uncertain and contingent that only at the insured's death were her rights made definite. Until the moment of death, the beneficiary's interest depended not only upon her surviving the insured, but also upon his failure to live until the end of the five year period, or if he should reach the end of the five year period, upon his failure to exercise his power to cancel the policy and receive the cash surrender value thereof.

The petitioners may point out, however, that the insured died February 27, 1921, and that the last five year period before his death ended May 22, 1918. They, therefore, seek to conclude that since

---

*The decision in *Pennsylvania Company, etc., et al.* v. *Commissioner* (C. C. A. 3d), decided August 8, 1935, not yet officially reported but found in 353–A C. C. H., par. 9543, would seem to reach a contrary result, although it turned on local law. The Government is applying for certiorari in that case, No. 576.

the Revenue Act of 1918 became effective (February 25, 1919) after that period of revocation had expired and before another such period had arrived, the statute would operate retroactively if applied. But that contention is, we submit, open to two fatal objections.

First, even after the enactment of the 1918 Act, the beneficiary's interest was wholly contingent. The possibility that the insured might live until May 22, 1923, and then exercise his right of cash surrender was indeed a substantial obstacle to her rights. That obstacle was in existence while the 1918 Act was in effect. And the removal of that obstacle by his death certainly operated to render her interest indefeasible. That event, however, transpired after the enactment of the 1918 Act.[7]

[7] In this connection it is pertinent to observe that the decedent's power to surrender the policies and to pledge them as security for loans was relied upon by the Court in the *Chase National Bank* case, 278 U. S. 327, 335. However, the power of the insured in that case to obtain the cash surrender value of the policies or to borrow from the insurance company upon the security of the policies was specifically limited by the terms of those policies to be effective only after three full years' premiums had been paid. See Record in *Chase National Bank* case, pp. 22, 26, 30. This fact was also pointed out by the Government. See Government's brief, p. 8. But the policies in that case were taken out on September 13, 1922, whereas the insured died on April 10, 1924, before the third year premiums had even become due. In short, the power of surrender and the borrowing power had not yet become operative at the time of his death, and are thus analogous to the power of surrender in the Connecticut policy herein which had not become operative between the enactment of the 1918 Act and the insured's death.

Second, although the present controversy arises under the 1918 Act, Congress had passed an estate tax statute which became effective on September 8, 1916. That Act was amended by the Act of March 3, 1917, c. 159, 39 Stat. 1000, Title III, and further amended by the Revenue Act of October 3, 1917, c. 63, 40 Stat. 300, Title IX. Thus, when the insured's power to call for cash surrender was last effective before his death, there was in existence a comprehensive estate tax law. The mere fact that the estate is being taxed under a later statute should be immaterial on the question of retroactivity. Cf. *Milliken* v. *United States*, 283 U. S. 15, 20 *et seq.* True, the earlier law had no specific provision regarding insurance. But it did present a comprehensive system of death taxes, and was sufficient to put one on notice that transactions testamentary in character, hitherto unprovided for, might be included in a later statute. It would, therefore, not be arbitrary and capricious to include such testamentary transactions in a later Act. Cf. *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 379; *Cooper* v. *United States*, 280 U. S. 409.

II

So Construed, Section 402 (F) Is Constitutional

Preliminary considerations

In *Nichols* v. *Coolidge*, 274 U. S. 531, this Court held that it would be unconstitutional to include in a decedent's gross estate certain property trans-

ferred by her, not in contemplation of death, during her lifetime and before the enactment of the pertinent statute, where the transferees' interests became indefeasibly vested at the time of the transfer.

It would seem that there were two independent theories implicit in the Court's decision. *First,* that it is improper to include in a decedent's estate transfers that are not testamentary in character. As the Court said (p. 540):

> But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death. * * *

The inference is that, entirely apart from the issue of retroactivity, the transfer could not be included because it was not testamentary. In a word, had the transfer even been made *after* the enactment of the statute, it could still not have been subject to the estate tax law. *Second,* that the transfers could not be included because they were made before the effective date of the statute, and that it would be unconstitutional to apply the statute retroactively.*

---

* The gift (deed) of the two residences was made on May 18, 1917. 274 U. S. 531, 533. But that date was after the enactment of the first Federal estate tax statute. It would seem, therefore, that under this Court's later decision in *Milliken* v. *United States*, 283 U. S. 15, the objection of retroactivity would be inapplicable at least as to that transfer.

It is in the light of both these objections that we propose to consider the present case.

A

LIFE INSURANCE IS INHERENTLY TESTAMENTARY IN CHARACTER. THE POLICIES HEREIN ARE PARTICULARLY SO BECAUSE OF THE CONTINGENT CHARACTER OF THE BENEFICIARIES' INTERESTS, AND IT IS THEREFORE APPROPRIATE TO INCLUDE THE PROCEEDS THEREOF IN THE INSURED'S GROSS ESTATE.

Reserving for the moment the question of retroactivity (i. e., assuming that the policies were taken out after the effective date of the statute), we submit that this case is not subject to the first objection in *Nichols* v. *Coolidge*. The 1917 conveyance in *Nichols* v. *Coolidge* was an *inter vivos* transaction, vesting immediate indefeasible rights in the transferees. As pointed out by the Court, it bore no reasonable relationship to property passing at death.

In this case we are dealing with life insurance policies taken out by the insured, who paid all the premiums thereon until the time of his death. It has always been the general and popular conception that life insurance is property which the insured leaves behind when he dies. In England this has been recognized for many years. As early as the Succession Duty Act of 1853, proceeds of life insurance, where the insured has paid the premiums, have been included in the measure of death taxes. See Hanson, Death Duties, 6th Ed., 1915, p. 629. This concept was continued in the English Finance

Act of 1894. See Hanson, *ibid.*, at pp. 82, 105. Cf. *Attorney-General* v. *Pearson*, [1924] 2 K. B. 375; *Attorney-General* v. *Dobree*, [1900] 1 Q. B. 442.

In enacting Section 402 (f) of the 1918 Act, Congress has also recognized that life insurance is by its very nature testamentary in character. The report of the House Committee on Ways and Means specifically declares (H. Rep. No. 767, 65th Cong., 2d Sess., p. 22):

> The provision with respect to specific beneficiaries has been included for the reason that insurance payable to such beneficiaries usually passes under a contract to which the insurance company and the individual beneficiary are the parties in interest and over which the executor exercises no control. Amounts passing in this way are not liable for expenses of administration or debts of the decedent and therefore do not fall within the existing provisions defining the gross estate. It has been brought to the attention of the Committee that wealthy persons have and now anticipate resorting to this method of defeating the estate tax. Agents of insurance companies have openly urged persons of wealth to take out additional insurance payable to specific beneficiaries for the reason that such insurance would not be included in the gross estate. A liberal exemption of $40,000 has been included and it seems not unreasonable to require the inclusion of amounts in excess of this sum.

Like gifts made in contemplation of death, life insurance is a substitute for a testamentary gift, and may therefore be properly assimilated to the estate of a decedent passing at his death. Gifts made in contemplation of death need not be revocable,* to justify including them in the gross estate. They are included because they are essentially testamentary in nature. Cf. *United States* v. *Wells*, 283 U. S. 102. Similarly, we submit, life insurance is so definitely linked up with testamentary transfers, that it is proper to include policies of life insurance in the insured's gross estate, entirely apart from rights of cash surrender, contingent character of specific beneficiary's interests, power to change beneficiary, etc. Cf. *Burnet* v. *Wells*, 289 U. S. 670.

But even if it were necessary to search for further justifications other than the inherent characteristics of insurance, the policies herein may properly be included in the decedent's estate. For here the beneficiary's interests were so incomplete

---

* In the case of ordinary *inter vivos* transfers, powers of revocation, reserved interests in the grantor, etc., may be necessary in order to render the transfer testamentary in character. Thus, in *Reinecke* v. *Northern Trust Co.*, *supra*, the power of revocation in the "two trusts" rendered otherwise non-testamentary transfers into ones that could be included in the grantor's gross estate. But gifts made in contemplation of death are *per se* testamentary and require no such additional characteristics to be assimilated to transfers at death. And we say the life insurance taken out by the insured and maintained by him until death is similarly *per se* testamentary.

during the insured's lifetime, that the removal of those contingencies alone by the insured's death is sufficient to characterize these transactions as testamentary. Certainly when the effect of these contingencies is considered together with the basic nature of life insurance, we believe that this case meets the first requirement stated in *Nichols* v. *Coolidge*, namely, that a transaction must have some reasonable connection with property passing at death in order to be employed in the measure of an estate tax.

II

AS TO RETROACTIVITY

The objection here is based upon the fact that the policies were taken out before the effective date of the first Federal estate tax statute. But the same reasons that we have advanced (I, B, *supra*) to remove this case from the scope of *Lewellyn* v. *Frick*, operate here also to overcome the constitutional objection based upon alleged retroactivity. In short, the beneficiary's rights became indefeasible for the first time at the insured's death, and that event occurred *after* the effective date of the statute. The statute therefore does not operate retroactively.[10]

CONCLUSION

The court below properly held that the proceeds of the four Berkshire policies and the Connecticut

---

[10]A similar objection as to retroactivity is raised in *Industrial Trust Co.* v. *United States*, No. 213, October Term, 1935. The Government's brief in that case contains a further discussion of the constitutional aspects of this issue.

policy must be included in the insured's gross estate. Its decision should be affirmed.

Respectfully submitted.

STANLEY REED,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
DAVID E. HUDSON,
SEWALL KEY,
ARNOLD RAUM,
Special Assistants to the Attorney General.

NOVEMBER 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

SUPREME COURT OF THE UNITED STATES.

No. 83.—October Term, 1935.

Norman W. Bingham, Jr., et al., etc., Petitioners, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[December 9, 1935.]

Mr. Justice Sutherland delivered the opinion of the Court.

This case involves the construction and constitutionality, as applied, of § 402 (f) of the Revenue Act of 1918, which provides that the value of the gross estate of the decedent shall be determined by including the value, at the time of his death, of all property "(f) to the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

Petitioners are the executors of the will of King Upton, who died in 1921 while the Act of 1918 was in force. His wife survived him. Long prior to the passage of the Act, a number of life insurance policies were issued to the decedent, among them four issued by the Berkshire Life Insurance Company of Massachusetts, originally payable to his estate; and one issued in 1883 by the Connecticut Mutual Life Insurance Company of Connecticut, payable to the wife of the decedent with a condition that in case of the predecease of the wife the amount of the policy should be payable to his children; or, if there be no children or descendants of children then living, to the legal representatives of the insured. In 1904, decedent assigned the four Berkshire policies to his wife, "provided she survives me". The decedent had no power, none being reserved, to change the beneficiaries, to pledge or assign the policies after the assignment to his wife, or revoke that assignment, or surrender the policies without the consent of the beneficiaries. *Washington Central Bank* v. *Hume*, 128 U. S. 195, 205; *Miles* v. *Connecticut Life Ins. Co.*, 147 U. S. 177, 181, 182, 183, compare

dissent p. 188; *Commonwealth* v. *Whipple*, 181 Mass. 341, 343; *Pingrey* v. *National Life Insurance Company*, 144 Mass. 374, 382.

After having deducted the specific exemption of $40,000, the Commissioner of Internal Revenue included the proceeds of these five policies in the decedent's gross estate, for the purpose of the federal estate tax. An action was brought in a federal district court to recover the amount of the tax resulting from the inclusion of these proceeds. That court rejected the view of the commissioner and awarded judgment to the taxpayers upon the authority of *Lewellyn* v. *Frick*, 268 U. S. 238. 7 F. Supp. 907.

The court of appeals reversed, holding that the *Frick* case was distinguishable. 76 Fed. (2d) 573. We think the view taken by the district court is the correct one.

1. Eleven policies were involved in the *Frick* case, all antedating the passage of the act. Among them was one issued by the Berkshire company and another issued by the Connecticut Mutual. These policies in terms were identical with the corresponding policies in question here. The assignment of the Berkshire policy there was the same as the assignments here. This court applied the rule that acts of Congress are to be construed, if possible, so as to avoid grave doubts as to their constitutionality; and said that such doubts were avoided by construing the statute as referring only to transactions taking place after it was passed. In that connection we invoked the general principle "that the laws are not to be considered as applying to cases which arose before their passage" when to disregard it would be to impose an unexpected liability that, if known, might have been avoided by those concerned. The court below sought to distinguish the decision on the ground that this court did not refer to those specific provisions set forth in the policies and assignments which are pertinent here. The government makes the same point, and contends that since this court did not allude to these provisions in the opinion, the decision cannot be regarded as having passed on their effect. It is true that questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. *Webster* v. *Fall*, 266 U. S. 507, 511. That, however, is not the situation in the present case. In *Lewellyn* v. *Frick* the policies and assignments, in their entirety, were definitely before

the court; and this necessarily included each of the provisions which they contained. Moreover, both in the appendix to the government's brief and in the main brief of the taxpayers, the attention of the court was distinctly called to all of the provisions which are now invoked. The latter brief summarized and described the provisions of the four classes of policies which were involved—one class being policies, it was pointed out, made payable to the Frick estate "subsequently assigned by Mr. Frick to his wife or daughter if she survived him, without reserving power to revoke the assignments." This court, without stopping to recite the various specific provisions that were thus clearly brought to its attention, held that the proceeds of none of the policies were subject to the estate tax under § 402 (f). It fairly must be concluded that in reaching that result these provisions were considered, and that such of them as bore upon the problem, there as well as here presented, were found not to require a different determination. We think the points now urged by the government were decided in the *Frick* case, and find no reason to reconsider them.

2. The principles so recently announced by this court in *Helvering* v. *St. Louis Union Tr. Co. et al.* (November 11, 1935), 296 U. S. —, and *Becker* v. *St. Louis Union Tr. Co. et al.* (November 11, 1935), 296 U. S. —, are decisive of the case in favor of the taxpayers. Those principles establish that the title and possession of the beneficiary were fixed by the terms of the policies and assignments thereof, beyond the power of the insured to affect, many years before the act here in question was passed. No interest passed to the beneficiary as the result of the death of the insured. His death merely put an end to the possibility that the predecease of his wife would give a different direction to the payment of the policies.

Judgment reversed.

Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo concur on the first ground stated in this opinion.

The Chief Justice concurs in this opinion, acquiescing in the second ground because of the recent decisions in the cases there mentioned.